(2)

92-344

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 2023—August Term 1991

Argued: June 26, 1992 Decided: July 29, 1992

Docket No. 92-6144

HAITIAN CENTERS COUNCIL, INC.; NATIONAL COALITION FOR HAITIAN REFUGEES, INC.; IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF NEW HAVEN, CONNECTICUT; DR. FRANTZ GUERRIER; PASCAL HENRY; LAURITON GUNEAU; MEDILIEU SOREL ST. FLEUR; DIEU RENEL; MILOT BAPTISTE; JEAN DOE; ROGES NOEL; on behalf of themselves and all others similarly situated; A. IRIS VILNOR; MIREILLE BERGER; YVROSE PIERRE; and MATHIEU NOEL, on behalf of themselves and all others similarly situated,
PLAINTIFFS-APPELLANTS,

-against-

GENE MCNARY, Commissioner, Immigration and Naturalization Service; WILLIAM P. BARR, Attorney General; Immigration and Naturalization Service; JAMES BAKER, III, Secretary of State; Rear Admiral ROBERT KRAMEK; Admiral KIME; Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay,
DEFENDANTS-APPELLEES.

Before: NEWMAN, PRATT, and WALKER, *Circuit Judges.*

Judge Newman, with whom Judge Pratt joins, concurs in a separate opinion.

Judge Walker dissents in a separate opinion.

PRATT, *Circuit Judge*:

On May 23, 1992, President George Bush issued an executive order which allowed the Coast Guard to intercept boatloads of Haitian refugees at sea and to return them to their persecutors in Haiti. The narrow issue we decide on this appeal is whether the government's actions, taken to implement this order, comport with § 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1). We hold that they do not.

FACTS AND BACKGROUND

The factual and procedural background to this lawsuit, including the volatile political climate in Haiti, is well-chronicled in our prior decision, *Haitian Centers Council, Inc. v. McNary*, Nos. 92-6090, 92-6104, slip op. 4371, 4374-85 (2d Cir. June 10, 1992) (*HCC I*), familiarity with which is assumed. This particular appeal, however, concerns events that primarily took place after the record in that case had been developed.

On May 23, 1992, President Bush signed an executive order which has come to be known as the "Kennebunkport Order". In part, it reads as follows:

> *Section 1.* The Secretary of State shall undertake to enter into, on behalf of the United States,

> cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.
>
> *Sec. 2.* (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.
>
> * * *
>
> (c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:
>
> (1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.
>
> (2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.
>
> (3) *To return the vessel and its passengers to the country from which it came,* or to another country, when there is a reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

Sec. 3. This order is intended only to improve the internal management of the Executive Branch. Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right or benefit, substantive or procedural (including without limitation any right or benefit under the Administrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

* * *

/s/ George Bush

THE WHITE HOUSE

May 23, 1992.

Exec. Order 12,807, 57 Fed. Reg. 23,133, 23,133-34 (1992) (emphasis added). Although the Kennebunkport Order did not specifically mention Haiti, the next day, when the order was released to the national news media, it was accompanied by a statement from the White House Press Secretary, which noted that the President had "issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti."

The Coast Guard followed orders, and immediately began to intercept numerous boatloads of Haitians in

international waters, and to forcibly return them to Haiti without determining whether they would be thereupon persecuted.

On May 28, 1992, plaintiffs sought a temporary restraining order before Judge Johnson, challenging the actions under the new policy as *ultra vires*, as well as violative of (1) § 243(h)(1) of the INA, (2) Article 33 of the 1954 Convention relating to the Status of Refugees, (3) the 1981 U.S.-Haiti Executive Agreement, (4) the Administrative Procedure Act, and (5) the equal protection component of the fifth amendment's due process clause. The district court held a hearing, at which the plaintiffs presented not only evidence demonstrating the heightened political repression currently occurring in Haiti, but also evidence that specific plaintiffs who had been returned have since been abused, were tortured, and were hiding in fear of their lives.

Judge Johnson construed the plaintiffs' motion as one for a preliminary injunction. Although he called the United States' actions "unconscionable", "particularly hypocritical", and "a cruel hoax", he nonetheless denied the injunction. Relying on his prior decision that the right to counsel under 8 U.S.C. § 1362 and 8 C.F.R. § 208.9 is limited to aliens found in the United States, Judge Johnson concluded that "Section 243(h) is similarly unavailable as a source of relief for Haitian aliens in international waters." He also concluded that although "[o]n its face, Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution", our prior decision in *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir. 1982) held that the Convention's provisions are not self-executing; thus, Judge

Johnson felt he could not grant plaintiffs the requested relief. He did not address the other issues raised by the plaintiffs.

We have jurisdiction over this expedited appeal under 28 U.S.C. § 1292(a)(1).

DISCUSSION

Although this is an appeal from the denial of a preliminary injunction, only questions of law are presented, and our usual *de novo* review applies. There is no challenge to Judge Johnson's finding that "the Plaintiffs undeniably make a substantial showing of irreparable harm"; thus, if the district court's view of the law was incorrect, then an injunction should issue.

On appeal, the plaintiffs wield the full arsenal of arguments that they wielded in the district court—§ 243(h) of the INA, Article 33 of the Refugee Convention, the 1981 U.S.-Haiti agreement, the APA, and the fifth amendment's equal protection component. The government addresses each of these contentions, and adds two of their own: (1) that since the subject plaintiffs are now back in Haiti, they stand in the same position as the "screened-out" plaintiffs in a similar federal action commenced in Florida, and are thus bound under principles of collateral estoppel by the eleventh circuit's holding in *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir.) (*per curiam*) (*HRC v. Baker*), *cert. denied*, 112 S. Ct. 1245 (1992); and (2) that the executive order falls within the President's constitutional powers as commander-in-chief and his inherent authority over foreign relations, and was issued "pursuant to an express or implied authorization of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

We address the dispositive contentions in turn.

A. *Preclusive Effect of* HRC v. Baker.

The administration's policy toward Haitian refugees has been the subject of litigation in two actions, one brought in Florida and the other in New York. Classes of Haitian refugees have been certified in both actions. *See* Fed. R. Civ. P. 23(a), 23(b)(2). The class in the Florida action, certified on December 3, 1991, was defined as

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

This "Florida class" is focused primarily on Haitians who have been "screened out" (*i.e.* interviewed by INS officers and found not to have a credible fear of persecution upon return to Haiti), although we have previously noted that it was defined in an "overly broad" fashion which did not fairly and adequately represent the interests of the plaintiffs herein. *See HCC I*, slip op. at 4392. In contrast, the class in the New York action, conditionally certified on April 7, 1992, was defined as "All Haitians who have been or will be 'screened in' ". *See id.* at 4390-91.

In *HRC v. Baker*, the eleventh circuit was presented with a "claim that [the Florida class plaintiffs] have judicially enforceable rights under the INA because the defendants' actions violate 8 U.S.C. § 1253(h) as it was amended by the Refugee Act." 953 F.2d

at 1509. The eleventh circuit concluded that the plaintiffs there (who were interdicted on the high seas but had not reached the United States, its borders, or any port of entry) could not assert a claim based on this section of the INA. *Id.* at 1510. Arguably, the eleventh circuit also passed upon the Article 33 issue. *Cf. id.* at 1508.

Plaintiffs identify three sub-groups within the New York class of "[a]ll Haitian citizens who have been or will be 'screened-in' " which are being harmed by the executive actions taken pursuant to the Kennebunkport order:

> (1) some 150 Haitians who have been repatriated even though previously screened-in;
>
> (2) thousands of Haitians with credible fears of persecution who are being or will be interdicted, but should have been screened-in; and
>
> (3) those Haitians on Guantanamo Naval Base who are now unscreened and would be screened-in but for the summary repatriation which the government may seek.

Additionally, there are other plaintiffs, screened out under the program that was in place prior to the Kennebunkport Order, who, although not members of the New York class certified by Judge Johnson, are nonetheless plaintiffs in this case. The government argues that all of these plaintiffs are enveloped in the Florida class, and are thus collaterally estopped from relitigating the § 243(h) issue and the Article 33 issue.

1. *Different parties.*

It is axiomatic that "a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (citing, *inter alia*, RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) (1982)). Collateral estoppel, known also as "issue preclusion", "prevents the parties' relitigation of an issue that was (a) raised, (b) litigated, and (c) actually decided by a judgment in their prior proceeding". *Prime Management Co. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990). To be bound by a prior judgment, a party in the subsequent litigation must have been a party to, or represented by a privy in, the prior action; otherwise, it would be a violation of due process to enforce the prior judgment against that party. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 & n.7 (1979).

We do not believe that any of the sub-groups of plaintiffs could fairly be characterized as a party to the Florida action; thus, the issues they present to us are not barred by collateral estoppel. As we have noted above, the Florida class of Haitian aliens had three requirements for membership:

> (a) current or future detention on cutters or at Guantanamo Bay;
>
> (b) interdiction "pursuant to the United States Interdiction Program", and
>
> (c) denial of first amendment and procedural rights (*i.e.*, the screening procedures).

Simply put, the plaintiffs here do not meet the second characteristic because they are not being interdicted "pursuant to the United States Interdiction Program"

that was before the eleventh circuit, thus they do not fit within the definition of the Florida class. The plaintiffs here have been or will be interdicted pursuant to a different interdiction program. The one at issue in *HRC v. Baker* was a program of preliminary screening before return; the program put in place by the Kennebunkport Order is one of summary return without screening. This is a change sufficient to avoid the class definition in *HRC v. Baker*.

Judge Johnson defined the New York class as "All Haitians who have been or will be 'screened in' ". This phrasing necessarily encompasses two subgroups of Haitians threatened by persecution: those who had arrived prior to the certification of the class on April 7, 1992, and those who arrived, or will arrive, thereafter. All of those class members who "will be", but have not yet been, screened in, are necessarily persons who will be interdicted pursuant to the new program put in place by the Kennebunkport Order. If interdicted at sea and summarily repatriated, those class members will be denied screening.

There is at least one other person who is also outside the scope of the Florida class, but who is nonetheless a plaintiff in this case. A. Iris Vilnor is "a Haitian being held in detention on Guantanamo who has been 'screened out' by the INS." Complaint ¶ 10, at 6, *HCC v. McNary*, No. CV-92-1258 (E.D.N.Y.). She purports to represent 8,000 other screened-out plaintiffs (the "Vilnor plaintiffs"). Although the plaintiffs in *HRC v. Baker* included screened-out Haitians, those plaintiffs were challenging the old program. Vilnor, and those she purports to represent, are challenging the new program, which was imposed under the Kennebunkport Order.

As to the Vilnor plaintiffs, the government claims that they have no interest in litigating the issues before us, because they have nothing to gain from a return to the old program. This argument, of course, is addressed to standing, not collateral estoppel, and in any event, the Vilnor plaintiffs do have standing because they are *not* on this motion asserting any right to an initial screening; rather, they are asserting a right, under § 243(h) of the INA and Article 33 of the Refugee Convention, not to be returned to Haiti. While screened-out before, this determination cannot be binding for all time, since political situations change. The Vilnor plaintiffs might well, upon a future interception, be found to have been threatened by persecution.

In sum, neither those plaintiffs who would be screened in, nor those plaintiffs who would be screened out but who are now being intercepted under the new interdiction program, are precluded by the *HRC v. Baker* litigation, as they were not members of the plaintiff class as defined in that case.

2. *Change in circumstances.*

Even if all of the requirements for issue preclusion are met, a court should nonetheless decline to give collateral estoppel effect to a prior judgment if there are "changes in facts essential to [the prior] judgment", *Montana v. United States*, 440 U.S. 147, 159 (1979), or if "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) (1982). We have accepted the view put forth in the Restatement's § 28(2), *Staten Island Rapid Transit*

Operating Auth. v. ICC, 718 F.2d 533, 543 (2d Cir. 1983), as have other courts, *e.g.*, *Kania v. Fordham*, 702 F.2d 475, 476 n.2 (4th Cir. 1983) ("Relitigation of an issue of public importance should not be precluded when there has been 'an intervening change in the applicable legal context.' "). Where pure, "unmixed question of law" are presented in successive actions, "preclusion may be inappropriate", for "[u]nreflective invocation of collateral estoppel * * * could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct * * * is critical." *Montana v. United States*, 440 U.S. at 162-63. *Accord Allen v. McCurry*, 449 U.S. 90, 95 n.7 (1980).

Especially where pure questions of law are presented, courts and commentators both have recognized that the interests of finality and judicial economy may be outweighed by other substantive policies, for in this circumstance "[t]he interests of courts and litigants alike can be protected adequately by the flexible principles of stare decisis." 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4425, at 244 (1981). *See also United States v. Stauffer Chem. Co.*, 454 U.S. 165, 177 (1984) (White, J., concurring) ("were consistency a compelling concern as between circuits, the decision of one circuit would bind the others even in litigation between two entirely different parties.")

As to those plaintiffs who are arguably members of the Florida class, we believe that the Kennebunkport Order represents "an intervening change in the applicable legal context", *see* RESTATEMENT (SECOND) OF JUDGMENTS § 28(2), which warrants "a new determination". *Id.* Since the dispositive question—whether § 243(h) of the INA applies to

conduct of the United States outside of our territorial waters—is one purely of law, few judicial resources would be saved by collaterally estopping these plaintiffs from litigating this issue, and the public importance of the issue merits full consideration on the merits, especially in light of the events that have occurred since the eleventh circuit decided *HRC v. Baker* and the Supreme Court denied *certiorari*.

After prevailing in the eleventh circuit, the Solicitor General of the United States opposed *certiorari* in *HRC v. Baker* by representing to the Supreme Court "that 'screened in' individuals would be brought to the United States so that they could file applications under the [INA] for asylum." *HCC I*, slip op. at 4382. *See also* Brief for United States in Opposition to *Certiorari* at 3, *HRC v. Baker*, *cert. denied*, 112 S. Ct. 1245 (1992) (No. 91-1292) (same). After that representation, the Supreme Court denied *certiorari* on February 24, 1992, Justice Blackmun dissenting. *See HRC v. Baker*, 112 S. Ct. 1245 (1992).

Only five days later, as we noted in *HCC I*, slip op. at 4382, the United States altered its policy in some respects, contravening the representation it had made to the Supreme Court. Then, scarcely two months later, the President issued the Kennebunkport Order, which made no pretense at all of adhering to the Solicitor General's prior representation to the Supreme Court. On the contrary, it permitted a policy, subsequently implemented, of *no* screening whatsoever.

A discretionary denial of review, of course, does not deprive a ruling of preclusive effect, *see*, *e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 28, comment a; but the circumstances surrounding the denial of *certiorari* in the Florida litigation weigh

significantly against granting that judgment preclusive effect in this action. The Supreme Court may well have seen no need to review *HRC v. Baker*, given the government's representation that no alien with a colorable claim of asylum would be turned away. But when the United States (a) resists Supreme Court review on a dramatic issue of such public import (a fact noted by three justices upon the denial of *certiorari*, *see* 112 S. Ct. at 1245-46), by representing that there will be screening of intercepted aliens followed by full consideration of asylum rights, (b) achieves the desired denial of *certiorari*, and then (c) embarks on a completely contrary policy, that is a change of the type that ought to permit an inferior court, unfettered by estoppel, to adjudicate the merits of a new case based on the new circumstances.

As will be seen, *infra*, we disagree with the eleventh circuit's conclusion that § 243(h) of the INA does not apply to return of refugees interdicted beyond the territorial waters of the United States. Since this creates an explicit "circuit split", the Supreme Court may see fit to grant *certiorari* on this case, *cf.* Sup. Ct. R. 10.1(a), and decide the issues which it declined to consider in *HRC v. Baker*. If it does, it will have the benefit of the carefully-considered, although contrary, views of two judicial circuits. The federal judicial hierarchy deserves this opportunity to consider this weighty issue on the merits, especially in light of the drastic changes in the legal context which have occurred since February 24, 1992.

Having concluded that we are not precluded in this case by the eleventh circuit's interpretation of § 243 (h)(1) in *HRC v. Baker*, we proceed to address the merits of that issue.

B. *Section 243(h)(1) of the INA.*

Before 1980, § 243(h) of the INA read as follows:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time he deems to be necessary for such reason.

In 1980 this section was replaced by a new § 243(h), consisting of two subparagraphs which were part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. With that change, § 243(h)(1) reads thusly:

> The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such aliens's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h)(1). This new statute makes the following textual changes: it strips the attorney general of the discretion formerly granted him under the old § 243(h) and makes his obligations under this new section mandatory; it applies now to "any alien", rather than "any alien within the United States"; and instead of authorizing the attorney general to "withhold deportation", it states that he "shall not deport or return" an alien found to have been threatened by persecution.

These amendments to this statute present us with two problems of construction and interpretation. First, we must determine whether Haitians intercepted in international waters fall within the scope

of "any alien" in § 243(h)(1). If so, we must turn to the second problem: whether intercepting Haitians in international waters and returning them to Haiti constitutes the "return" of an alien, conduct that would be impermissible under § 243(h)(1).

1. Congress has already resolved the first problem for us, for in § 101(a)(3) of the INA, 8 U.S.C. § 1101(a)(3), it has provided that, as used in the INA, "[t]he term 'alien' means any person not a citizen or national of the United States." The plain language of this provision makes clear that aliens are aliens, regardless of where they are located. Since the words of the statute are unambiguous, " 'judicial inquiry is complete.' " *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). In light of this congressional definition, the plaintiffs in this case, who are citizens of Haiti, not of the United States, are plainly designated by the term "any alien", used by congress in § 243(h)(1).

Since the plain language of § 243(h)(1) and § 101(a)(3) appears to resolve the first statutory problem before us, we may turn to other canons of construction only to determine whether there is a "clearly expressed legislative intention" contrary to that language, which would require us to question the virtually-conclusive presumption that congress meant what it said. *United States v. James*, 478 U.S. 597, 606 (1986). *But see INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) (only when the plain language leads to a "patent absurdity"); *Union Bank v. Wolas*, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring) (only to find "a 'scrivener's error' producing an absurd result"). The government nevertheless tenders numerous reasons—the presumption against extraterritorial application, an assertedly inconsistent provision in § 243(h)(2)(C), § 243's placement in part V of the INA, and other provisions of the INA which expressly limit their application to aliens "within the United States"—to support its argument that § 243(h)(1) does not apply to these plaintiffs. We reject all of these arguments, none of which is ufficient to overcome the plain language of § 243(h)(1).

First, the presumption that laws of the United States have no extraterritorial application has no relevance in the present context. That presumption is a canon of construction "whereby *unexpressed* congressional intent may be ascertained", *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (emphasis added), which "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991). But congress knew "how to place the high seas within the jurisdictional reach of a statute", *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989), and it did so here by making § 243(h)(1) apply to "any alien" without regard to location. Additionally, comity is of reduced concern here, as the Haitians are being intercepted in international (*i.e.*, non-sovereign) waters. We are thus not faced with the spectre of forum-shopping refugees coming into United States courts in order to enforce some right that courts in Haiti would not recognize; on the contrary, § 243(h)(1) may be invoked only in United States courts, and only against the United States government. Only when the United States itself acts extraterritorially does § 243(h)(1) have extraterritorial application. Absent proactive

government intervention of the sort presented here, § 243(h)(1)'s ban on "return" of aliens to their persecutors could not be invoked by persons located outside the borders of the United States.

Second, the government points us to § 243(h)(2)(C) of the INA, which directs that the provisions of § 243(h)(1) shall not apply if "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. § 1253(h)(2)(C). The government argues that the language "prior to the arrival of the alien in the United States" means that § 243(h)(1) cannot apply to these plaintiffs, who have not arrived in the United States. We disagree.

To accept the government's reading of the statute, we would, in effect, be reading the words "within the United States" back into § 243(h)(1), which would counter congress's plainly expressed intent to eliminate those limiting words in 1980. The Supreme Court only recently reminded us of "the canon of statutory construction requiring a change in language to be read, if possible, to have some effect, see, *e.g.*, *Brewster v. Gage*, 280 U.S. 327, 337 (1930); 2A N. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992)." *American Nat'l Red Cross v. S.G.*, 60 U.S.L.W. 4631, 4635 (U.S. June 19, 1992). Our reading, on the other hand, gives full vitality to all portions of § 243(h), as actually written by congress. True, the "serious nonpolitical crime" exception in § 243(h)(2)(C) does not apply to an alien who has not arrived in the United States, but that seems to be precisely what congress meant to accomplish. Not only is that the way they worded the exception, but it also comports with common sense. The United

States would have a strong domestic interest in keeping alien criminals out of its territory (and out of its prisons), and a strong foreign policy interest in refraining from granting safe haven to nonpolitical criminals fleeing from other countries.

Before 1980, § 243(h) distinguished between two groups of aliens: those "within the United States", and all others. After 1980, § 243(h)(1) no longer recognized that distinction, although § 243(h)(2)(C) preserves it for the limited purposes of the "serious nonpolitical crime" exception. The government's reading would require us to rewrite § 243(h)(1) into its pre-1980 status, but we may not add terms or provisions where congress has omitted them, *see Gregory v. Ashcroft*, 111 S. Ct. 2395, 2404 (1991); *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991), and this restraint is even more compelling when congress has specifically removed a term from a statute: "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded". *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting) (quoted with approval in *INS v. Cardoza-Fonseca*, 480 U.S. at 442-43). "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250 (1926) (Brandeis, J.).

The third reason urged by the government for not reading the statute literally, is that § 243(h)(1) is located in Part V of the INA. This argument similarly fails. Part V of the INA deals primarily with deportation and adjustment of status. The eleventh circuit relied on this fact—almost exclusively—to conclude that "[t]he provisions of Part V of the INA

dealing with deportation only apply to aliens 'in the United States.'" *HRC v. Baker*, 953 F.2d at 1510 (citing, *inter alia*, 8 U.S.C. §§ 1251, 1253(a)). Putting aside the fact that it ignores the plain language of § 243(h), this argument ascribes entirely unwarranted weight to the location of the provision: of course, the provisions of Part V "dealing with deportation" must apply only to aliens "in the United States", since an alien must be "in" the "port" of a country in order to be "de-ported" from it. *See generally* 8 U.S.C. § 1251(a) ("Any alien * * * in the United States" may be deported if certain conditions are met); David A. Martin, *Major Issues in Immigration Law* 9-10 (Federal Judicial Center 1987).

The statute's location in Part V reflects its original placement there before 1980—when § 243(h) applied by its terms only to "deportation". Since 1980, however, § 243(h)(1) has applied to more than just "deportation"—it applies to "return" as well (the former is necessarily limited to aliens "in the United States", the latter applies to all aliens). Thus, § 243, which applies to all aliens, regardless of whereabouts, has broader application than most other portions of Part V, each of which is limited by its terms to aliens "in" or "within" the United States; but the fact that § 243 is surrounded by sections more limited in application has no bearing on the proper reading of § 243 itself. If anything, it has an effect opposite to what the government suggests: it tends to prove that if congress had meant to limit § 243(h)(1)'s scope to aliens "in the United States", it surely knew how to do that. "'"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion."'" *INS v. Cardoza-Fonseca*, 480 U.S. at 432 (citations omitted).

Lastly, we reject the government's suggestion that since § 243(h) restricts actions of only the attorney general, the President might in any event assign the same "return" function to some other government official. Congress understood that the President's agent for dealing with immigration matters is the attorney general, *see* 8 U.S.C. § 1103(a); *cf. Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972), and we would find it difficult to believe that the proscription of § 243(h)(1)—returning an alien to his persecutors—was forbidden if done by the attorney general but permitted if done by some other arm of the executive branch.

In sum on this point, the district court erred in concluding that § 243(h)(1) does not apply to aliens outside the United States. By drawing its conclusion from its earlier right-to-counsel ruling, the district court failed to appreciate the differences in the plain language of the two statutes. The INA's right-to-counsel provision, 8 U.S.C. § 1362, applies to "the person concerned" in "any exclusion or deportation proceeding[]", whereas, as we have already noted, § 243(h)(1) applies by its terms to a much broader class of persons—all "aliens", no matter where located.

2. Having concluded that § 243(h)(1) applies to all "aliens", we must face the other textual problem posed by the statute: whether the government's interception and forcible repatriation of Haitian refugees constitutes a "return" of those refugees to their persecutors in violation of § 243(h)(1). We conclude that it does.

Section 243(h)(1) prohibits the government from both *deporting* and *returning* an alien. Virtually all prior litigation under this subsection has focused on the term "deport"; not until the executive's recent actions in "reaching out" to repatriate Haitians has litigation attention shifted to the term "return", which is nowhere defined in the INA. Since congress provided no special defintions, we must interpret § 243(h)(2) by "giving the 'words used' their 'ordinary meaning' ", *Moskal v. United States*, 111 S. Ct. 461, 465 (1990) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). The rule is no different for the INA: we " 'assume "that the legislative purpose is expressed by the ordinary meaning of the words used." ' " *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (citations omitted).

Congress directed that the "Attorney General shall not * * * return any alien to a country" that would persecute the alien. When used, as here, in its transitive mode, the word "return" means "to bring, send, or put (a person or thing) back to or in a former position". *Webster's Third New International Dictionary* 1941 (1971). Here, congress has amplified the meaning of "return" by adding after the word "return", the prepositional phrase "to a country [where he would be persecuted]"; significantly, congress made no mention of where the alien (who may be anywhere, within or without the United States) must be returned "from". Of parallel significance, the Kennebunkport Order itself directs the Coast Guard to "return the vessel and its passengers *to* the country from which it came". (emphasis added). As we do with congress, we presume that the President of the United States uses words with their "ordinary meaning"; thus, when the "return" directed by the President is *to* a persecuting country, it is exactly the kind of "return" that is prohibited by § 243(h)(1) of the INA.

Since the plain language of § 243(h) demonstrates that what is important is the place "to" which, not "from" which, the refugee is returned, and since § 243(h)(1) by its terms (a) applies to all "aliens" regardless of their location, and (b) prohibits their "return * * * to a country" where they would likely be persecuted, we conclude that the executive's action of reaching out into international waters, intercepting Haitian refugees, and returning them without determining whether the return is to their persecutors, violates § 243(h)(1) of the Immigration and Nationality Act.

The government does not offer a contrary view of the term "return" in § 243(h)(1); rather, it argues that the 1980 amendment to § 243(h) merely "makes the language read like Article 33" which, the government assures us, prohibits the "return" only of refugees who have entered the territory of the contracting state. Thus, we must turn our attention to the government's reading of Article 33.

3. Article 33 of the Refugee Convention, which is entitled "Prohibition of expulsion or return ('refoulement')", reads:

> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefits of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a

> danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

United Nations Convention relating to the Status of Refugees, 189 U.N.T.S. 150, 176 (1954). Although the United States was not a party to the original Refugee Convention, the provisions of that Convention were nonetheless ratified by the United States when it acceded to the 1967 Protocol relating to the Status of Refugees ("Protocol"). 19 U.S.T. 6223, 6225.

The Supreme Court has recognized "that one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, * * * to which the United States acceded in 1968." *INS v. Cardoza-Fonseca*, 480 U.S. at 436-37. *See also INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring) ("In 1980, Congress removed all doubt concerning the matter" of whether the Attorney General "honored the dictates" of Article 33.1); *INS v. Stevic*, 467 U.S. 407, 421 (1984) (the Refugee Act of 1980 amended § 243(h), "basically conforming it to the language of Article 33 of the United Nations Protocol.") *HCC I*, slip op. at 4409 (same). *Cf. United States Dept. of State v. Ray*, 112 S. Ct. 541, 543 n.1 (1991) (footnote).

In construing treaties, we use principles analogous to those that guide us in the task of construing statutes. *Cf. United States v. Stuart*, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (if "the Treaty's language resolves the issue presented, there is no

necessity of looking further to discover 'the intent of the Treaty parties' "). Rather than having evolved from a judicial common law, however, principles of treaty construction are themselves codified, in Article 31 of the Vienna Convention on the Law of Treaties (also known as "the Treaty on Treaties"), 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969), *entered into force* Jan. 27, 1980. Although the United States has not ratified the Vienna Convention, it is a signatory. We have previously applied the Vienna Convention in interpreting treaties, *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir. 1975) (Warsaw Convention), *cert. denied*, 429 U.S. 690 (1976), as has the United States Department of State. *See* Letter from Edwin D. Williamson, Legal Adviser, Department of State, to Timothy E. Flanigan, Acting Assistant Attorney General 2 (Dec. 11, 1991) (regarding *HRC v. Baker*).

As with statutes, treaties are to be construed first with reference to their terms' "ordinary meaning * * * in their context", and "in light of their object and purpose." Vienna Convention, art. 31(1). The plain meaning of treaty terms controls " 'unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." ' " *United States v. Stuart*, 489 U.S. at 365-66 (citations omitted). To stray from clear treaty language, there must be "extraordinarily strong contrary evidence". *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). According to Article 32 of the Vienna Convention, "supplementary means of interpretation", which consist primarily of the preparatory and conclusory circumstances of a treaty (the international equivalent of legislative history) are to

be turned to only as a last resort, and then only if the primary tools of interpretation enumerated in Article 31 of the Vienna Convention "leave[] the meaning ambiguous or obscure" or lead to a "manifestly absurd or unreasonable result."

The plain language of Article 33.1 of the Refugee Convention leads us to conclude that, just as with § 243(h)(1), the word "return" means "return", without regard to where the refugee is to be returned *from*, and, just as with § 243(h)(1), what *is* important under Article 33.1 is where the refugee is to be returned *to*. The Protocol's definition of "refugee" is extremely persuasive on this point. Under the Protocol, a "refugee" is "any person who * * * owing to a well-founded fear of being persecuted * * * is outside the country of his nationality". Thus, a "refugee" under the Protocol, just as with "any alien" under § 243(h)(1) of the INA, is defined not with regard to his current location but with regard to his past location.

Article 33.1's prohibition against "return" plainly applies to *all* refugees, regardless of location. This reading is borne out by the language used in other articles of the Refugee Convention that have a more limiting effect on the term "refugee". *See, e.g.*, Article 4 ("refugees within their territories"); Article 15 ("refugees lawfully staying in their territory"); Article 17.1 (same); Article 18 ("refugee lawfully in their territory"); Article 19.1 ("refugees lawfully staying in their territory"); Article 21 (same); Article 23 (same); Article 24.1 (same); Article 26 ("refugees lawfully in its territory"); Article 27 ("refugee in their territory"); Article 28 ("refugees lawfully staying in their territory"); Article 31.1 (refugees who "enter or are present in their territory

without authorization"); Article 32.1 ("refugee lawfully in their territory").

The government's position, that Article 33.1 applies only to refugees who have entered the territory of the contracting state, is therefore untenable in view of the plain language of that section. Had the parties to the Refugee Convention meant to limit its application in that way, we would expect a wording of that section in line with, for instance, Article 4 ("refugees within their territories"). But the contracting states did not so limit Article 33.1; instead, the term "a refugee" in Article 33.1 encompasses all "refugees". *Accord* Offices of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* 9 (1979) ("A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined.").

This reading of Article 33.1 is further supported by the "object and purpose" not only of that article, but also of the Refugee Convention as a whole. It is clear that the purpose of Article 33.1 is to prevent all "refugees", "in any manner whatsoever", from being put into the hands of those who would persecute them. One of the considerations stated in the Preamble to the Convention is that the United Nations has "endeavoured to assure refugees the widest possible exercise of * * * fundamental rights and freedoms." The government's offered reading of Article 33.1, however, would narrow the exercise of those freedoms, since refugees in transit, but not present in a sovereign area, could freely be returned to their persecutors. This would hardly provide refugees

with "the widest possible exercise" of fundamental human rights, and would indeed render Article 33.1 "a cruel hoax".

The Protocol, moreover, indicates that Article 33's *nonrefoulement* obligation must be enforced as written. Although contracting states may make "reservations" as to the terms of other articles in the Refugee Convention, Article 33 is one of the few articles which may not be tampered with by the contracting states. *See* Protocol, art. VII.1. Additionally, Article I.3 of the Protocol provides that the "Protocol shall be applied by the States Parties hereto without any geographic limitation". In short, were we to accede to the government's offered reading of Article 33.1, we would be endorsing a reading so limited as to be fundamentally contrary to the Protocol's, and to the Refugee Convention's, "object and purpose" as expressed by the plain language.

The government nonetheless offers us numerous reasons to stray from the straight-and-narrow path of plain language. First, it argues that the inclusion of the French term "*refouler*", placed in parentheses after the word "return" in Article 33.1, "connotes ejection of an alien from within the territory of the Contracting State." Brief for United States at 40. In support of this argument, the government cites from *Cassell's French Dictionary* one of the many meanings of "*refouler*": "expel (aliens)"; and the government contends that a refugee cannot be expelled if he is not yet in a country.

Plaintiffs offer a somewhat different interpretation of "*refouler*" from the *Dictionnaire Larousse*, which suggests that it implies repelling or driving back an alien who has not yet entered. Similar meanings of "*refouler*" are found in *Cassell's*, the government's

source. As the plaintiffs point out, the government's strained reading of Article 33.1 would forbid a state to "expel or expel" an alien. Recognizing this anomaly, the government responds by suggesting that "expel or return ('*refouler*')" is to be read as a "unitary whole". However, the French text of the Refugee Convention (which, according to Article 46 of the Refugee Convention, is "equally authentic" to the English text) undercuts the government's reading; the French text ("Aucun des Etats Contractants n'expulsera ou ne refoulera"), by using "ou", meaning "or", conclusively shows that expel (*expulsera*) and return (*refoulera*) are to be read disjunctively, not as a "unitary whole".

The government, however, suggests that the plaintiffs' reading of "*refouler*" renders the word "expel" superfluous, since "return" would then encompass all modes of return, by expulsion or otherwise. The government may actually be correct in this assumption, but the contracting states had good reason to specifically include "expel", for under the Refugee Convention, it is a term of art. Article 32, which is entitled "Expulsion", forbids a contracting state to "expel a refugee lawfully in their territory". If Article 33.1 had not contained the word "expel", it might not have been as clear that it applied to that specific manner of "return" in addition to other manners. *Accord* Guy S. Goodwin-Gill, *The Refugee in International Law* 69 (1983) ("*Refoulement* is thus to be distinguished from expulsion or deportation, the more formal process whereby a lawfully resident alien may be required to leave a state, or be forcibly ejected therefrom.").

The second reason that we should stray from the plain language of Article 33.1, says the government,

is that the President has interpreted the article as not applying to "persons located outside the territory of the United States", Exec. Order 12,807, 57 Fed. Reg. at 23,133, and his interpretation, says the government, "is entitled to great weight." *See, e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. at 185. However, it is by no means conclusive. *Id.* at 184.

In this case, the executive branch's interpretation of Article 33.1 appears to be much closer to a litigating posture than it is to an authoritative interpretation, and in any event it diverges markedly from the clear language of the Refugee Convention. Moreover, "it is not clear here precisely what position of the [executive] this court ought to defer to", *Lewis v. Grinker*, No. 91-6176, slip op. 1475, 1507 (2d Cir. Jan. 31, 1992), since the executive has previously read Article 33.1 in a contrary fashion. In a December 11, 1991, letter to Acting Assistant Attorney General Timothy E. Flanigan, which was "Re: *Haitian Refugee Center, Inc. v. Baker*", the Legal Adviser of the Department of State wrote:

> Dear Tim:
>
> I am writing to provide you with the formal opinion of the Department of State on the question whether the *non-refoulement* obligation of Article 33 of the 1951 U.N. Convention Relating to the Status of Refugees ("the Refugee Convention") imposes obligations on the United States with respect to refugees outside United States territory. We have previously and publicly taken the position that the obligation applies only to persons within the territory of a Contracting State. This remains our firm view. For the reasons indicated below, the Department respectfully requests that you reconsider and withdraw the apparently contrary legal conclusion reflected in the opinion of the Office of Legal Counsel of August 11, 1981.

Acting Assistant Attorney General Flanigan concurred in the Department of State's request in a letter sent the next day, although that letter seemed to rely more extensively on the fact that, in the attorney general's view, the Protocol was not self-executing. What *is* clear from this exchange of letters is that the attorney general, at least from August 11, 1981, until *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987), took the position that Article 33.1's *nonrefoulement* provisions did apply outside the territory of the United States. *See* 5 Op. Off. Legal Counsel 242, 248 (1981) ("Individuals [intercepted on the high seas] who claim that they will be presecuted * * * must be given an opportunity to substantiate their claims [under Article 33.1]."). Given the facts that the executive branch has taken two contrary positions on Article 33.1's prohibition of *refoulement*, and that the second interpretation was "the sort of *post hoc* litigation posture that is entitled to no deference", *Lewis v. Grinker*, slip op. at 1507, we would not feel justified in viewing the second interpretation as the sort of "extraordinarily strong contrary evidence" needed to nullify the plain language of Article 33.1.

Third, the government argues that its reading of Article 33.1 is actually *supported* by the text of Article 33, and of the Convention, as a whole. We reject this contention as well. Article 33.2 carves out an exception to Article 33.1, much like § 243(h)(2)(C) of the INA does with § 243(h)(1). However, it does

not follow that all refugees covered by Article 33.1 are potentially subject to the Article 33.2 exception; on the contrary, the latter section is limited (for good reason of national security) to refugees "in" a certain country. Moreover, the government's argument that the geographical limits that are placed on "refugees" in other areas of the Convention tacitly limit the use of "refugee" in Article 33.1 actually supports a contrary reading, as we have noted, *supra*. With the usual apologies to Cicero, Article 33.1's silence on geographic limitation shouts loudly its proper meaning. *Cf. Greenberg v. Board of Governors*, No. 91-4200, slip op. 4621, 4634 (2d Cir. June 19, 1992).

The government's fourth and final assault on the clear language of the Refugee Convention comes in the form of what Justice Scalia recently called "that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history." *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2111 (1992) (Scalia, J., concurring). In this regard, the government relies on the negotiating history of the Refugee Convention, as well as the circumstances of the United States' accession to the Protocol.

The government's argument is essentially the same argument put forth by Judge Edwards in his thoughtful and scholarly concurrence in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 839-41 (D.C. Cir. 1987). There, Judge Edwards relied *exclusively* on the negotiating history of the Refugee Convention to conclude that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." *Id.* at 840. The linchpin of the government's (and of Judge Edwards') argument is the statement of the Netherlands' representative at the final reading of the

draft Refugee Convention, which appears *id.* at 840 n.133. For convenience, we reproduce it below:

> Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" (*"refoulement"*) related to a refugee already within the territory but not yet resident there. According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations.
>
> He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.
>
> At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.
>
> In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.
>
> There being no objection, the PRESIDENT [of the Conference] *ruled* that the interpretation

given by the Netherlands representative should be placed on record.

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-fifth Meeting, U.N. Doc. A/CONF. 2/SR. 35, at 21 (July 25, 1951) (emphasis in original).

This presents the biggest possible pitfall in the use of legislative history: what do we do when the legislative history is ambiguous? Although Judge Edwards concluded that this legislative history was an "agree[ment]," *see Haitian Refugee Center v. Gracey*, 809 F.2d at 840, the above-quoted passage is ambiguous on even this point. The Netherlands' representative asked that it be placed on record "that the Conference was in agreement" with his interpretation, but the President ruled only that "the interpretation given by the Netherlands representative should be placed on record." Judge Edwards' reading of this passage is a fair one; it would, however, be an equally-fair reading to see this passage as simply recording the views of a dissenting member. This is the view of *amicus* Office of the United Nations High Commissiner for Refugees, whose *Handbook on Procedure and Criteria for Determining Refugee Status* "provides significant guidance in construing the Protocol". *INS v. Cardoza-Fonseca*, 480 U.S. at 439 n.22.

Moreover, the concern of the Netherlands' representative is that his country "could not accept any legal obligations in respect of large groups of refugees seeking access to its territory." He may well have meant only that his country would be free to close its borders in the face of a threat of mass migration, leaving fleeing refugees the opportunity to make their way (by land or air) to some other haven. But his

concern not to accept "any legal obligations", even if shared by others considering the treaty, would not have meant that his country could go beyond the negative act of closing its border and take the affirmative steps of seizing refugees approaching the border and forcibly carrying them back to the custody of those from whom they are fleeing.

Thus, even if we were to turn statutory construction on its head, and look to the words of the statute only when the legislative history is unclear, we would have to draw the same conclusion: Article 33.1 applies to all refugees, just as § 243(h)(1) of the INA applies to all aliens, no matter where found.

C. *Article II Powers and Other Justifications for the Kennebunkport Order.*

Finally, the government offers numerous reasons why the summary return of Haitians is authorized by law. We find none of these arguments sufficient to overcome the will of Congress as expressed in § 243(h)(1) of the INA, for "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely on upon his own constitutional powers minus any constitutional power of Congress over the matter". *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 637 (Jackson J., concurring).

The government suggests that both the President's constitutional position as "Commander in Chief of the Army and Navy of the United States", U.S. Const. art. II, § 2, cl. 1, and his "inherent authority as ' "the sole organ of the nation in its external relations" ' ", Brief for United States at 27 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319

(1936), in turn quoting Annals of Congress, 6th Cong., col. 613 (Mar. 7, 1899)), justify the Kennebunkport Order. We disagree.

The Supreme Court said, in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), that "[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." But the reason for that rule is absent here, for this case does not deal with the sovereign right "to turn back from our gates any alien or class of aliens." *Id.* at 550 (Jackson, J., dissenting). To the contrary, when seized, these aliens were far from, and by no means necessarily heading for, our gates.

Similarly, we reject the government's arguments that §§ 212(f) and 215(a)(1) of the INA, which allow the President to "suspend the entry of all aliens or any class of aliens" and to place such "reasonable rules, regulations * * * limitations and exceptions" on the entry of aliens as he deems appropriate, also allow him to order the summary return to their persecutors of aliens intercepted on the high seas. The President's power to regulate "entry" into the United States is not questioned on this appeal. Even though the executive's actions have the practical effect of prohibiting some Haitians' entry into the United States, they also have the effect of prohibiting the Haitians from gaining entry into the Bahamas, Jamaica, Cuba, Mexico, the Cayman Islands, or any other country in which they might seek safe haven. By enforcing the INA's prohibition against forcible return of refugees, we leave unimpaired the President's authority to regulate entry into this country.

The government says that this is "an absurd result", since, under this reading, "the President could authorize the Coast Guard to block the path of Haitian vessels sailing toward Miami and force them back to sea without regard for their safety, but could not return them to land." Brief for United States at 30. We do not see the absurdity. This argument fails because it embraces two unwarranted assumptions—one express, the other not. While some intercepted Haitians may in fact be heading for Miami, some may also be heading toward other nations. The government's actions prevent the Haitians from seeking asylum in *any* country. Also, the unstated premise—that returning these Haitians to their persecutors is somehow "in regard for their safety"—is itself absurd.

Likewise, while the President is entitled to lead the country's external relations, he apparently did not view the Kennebunkport Order as addressing a foreign policy concern; on the contrary, the executive order specifically states that it was "intended only to improve the internal management of the Executive Branch." Exec. Order 12,807, 57 Fed. Reg. at 23,134. In any event, congress, wielding its "complete", "plenary" legislative power over immigration matters, *see Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Boutelier v. INS*, 387 U.S. 118, 123 (1967), has spoken directly to the question at issue so that "[t]his is a job for the Nation's lawmakers, not for its military authorities." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 587. Similarly, we reject any suggestion that the Kennebunkport Order was issued "pursuant to an express or implied authorization of Congress", *id.* at 635 (Jackson, J., concurring), for we can hardly infer congress's per-

mission for the executive to do what it *expressly* forbade him from doing by § 243(h)(1) of the INA.

The government also argues that the Kennebunkport Order draws on the authority that congress gave to the Coast Guard to compel compliance with the laws of the United States on the high seas, including the power to use "all necessary force to compel compliance." 14 U.S.C. § 89(a). According to the government, the Haitians are somehow violating the INA's prohibition on illegal entry while afloat on the international waters of the Windward Passage. This argument is perplexing at best, and in any event provides no ground for sustaining the current interdiction program.

Lastly, although not raised in so many words, there is an undercurrent in the government's brief to the effect that this case presents a "political question" which is beyond the scope of judicial decisionmaking. We strongly disagree, for this case involves a determination of whether the current interdiction program itself (a creation of an executive order and thus of law, *see Acevedo v. Nassau County, NY*, 500 F.2d 1078, 1084 n.7 (2d. Cir. 1974)) is consistent with a federal statute. As our discussion above amply illustrates, there exists no "lack of judicially discoverable and manageable standards" to apply. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). "The federal courts may review a case such as this one to insure that 'the executive departments abide by the legislatively mandated procedures.'" *Haitian Refugee Center v. Gracey*, 809 F.2d at 838 n.116 (Edwards, J., concurring) (quoting *International Union of Bricklayers v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985)).

CONCLUSION

The plain language of § 243(h)(1) of the Immigration and Nationality Act clearly states that the United States may not return aliens to their persecutors, no matter where in the world those actions are taken. In view of this, plaintiffs' arguments regarding the self-executing nature of Article 33.1 of the Refugee Convention are largely academic, since § 243(h)(1) provides coextensive protection.

In light of our conclusion that § 243(h)(1) prohibits the actions at issue, we need not address the plaintiffs' remaining arguments in favor of reversal. The order of the district court is reversed, and the case is remanded to the district court with instructions to enter an injunction prohibiting the defendants from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

Reversed and remanded with instructions. The mandate shall issue forthwith.

JON O. NEWMAN, *Circuit Judge*, with whom Judge Pratt joins, concurring

I concur in Judge Pratt's opinion and add these few words primarily to clarify what I believe is the significance to the collateral estoppel issue of the Government's shift from the position it took when it successfully opposed certiorari in *Haitian Refugee Center v. Baker*, 949 F.2d 1109 (11th Cir. 1991) ("HRC"), to the position it now takes with regard to interdiction. The Government persuaded the Supreme Court not to review the Eleventh Circuit's decision by assuring the Court that it would screen Haitian refugees and bring to this country those who qualified for asylum. Having made that representation to insulate from review a decision that the screening policy was lawful, the Government now asks us to apply collateral estoppel to a lawsuit challenging the new policy of returning Haitians without screening—a policy Judge Pratt and I believe is unlawful. If we were to accede to that argument, we would be letting the Government keep the Eleventh Circuit ruling from the Supreme Court on a promise that is no longer being honored and then let the Government keep our decision from the Supreme Court by asserting that we had correctly applied collateral estoppel. That would be gamemanship of the rankest sort, especially inappropriate in a lawsuit affecting people's lives.

Judge Walker in dissent, misperceives the point of our discussion of the Government's change of position from what it asserted in opposition to certiorari in *Baker*. First, he points out that the plaintiffs are not entitled to certiorari. That is true, but entirely beside the point. We are not suggesting that the HRC plaintiffs were entitled to have the Supreme Court review

the Eleventh Circuit's decision. We are suggesting that the Government cannot fend off such review on a promise to pursue one policy, then abandon that policy, and then use that unreviewed decision, insulated from review by a representation no longer being honored, to obtain a collateral estoppel ruling from this Court as to the lawfulness of the new policy. I do not question the Government's right to change its mind. But I do question its right to secure a litigating benefit from the position it previously asserted and then, after it has abandoned that position, to secure another litigating benefit in this Court.

Judge Walker also suggests that what the plaintiffs are really arguing is that the Supreme Court should apply some sort of equity argument to grant review of the collateral estoppel ruling he believes we should make in this case. But that is not at all what the plaintiffs are arguing. They are not so easily gulled. They understand that the issue is not whether some generous certiorari review should be applied to our collateral estoppel ruling. Instead, the issue is whether we should apply collateral estoppel in the first place. We should not do so, especially since we disagree on the merits with the Eleventh Circuit and since the Government has now abandoned the promise it made to the Supreme Court in fending off review of that Circuit's ruling.

With respect to the merits, I wish to add only one point. Judge Walker maintains that section 243(h) is confined to the territorial limits of the United States because its reach is coextensive with section 208(a), which establishes asylum procedures for "an alien physically present in the United States or at a land border or port of entry," 11 U.S.C. sec. 1158(a) (1988). I can readily agree that the two provisions are co-extensive in most of their applications. When

Congress drafted both sections 208(a) and 243(h), it was most likely thinking primarily of those who would arrive at our shores seeking asylum. The idea that our country would seize aliens in foreign lands or on the high seas and return them to their persecutors was probably not in the contemplation of most legislators. But the language of section 243(h), like the language of the UN Protocol that it implements, goes one step beyond the scope of section 208(a): It forbids our country from laying hands on an alien anywhere in the world and forcibly returning him to a country in which he faces persecution.

Unlike section 243(h), the asylum procedure of section 208(a) is explicitly limited to those in our territory. But asylum procedures for entry of an alien do not operate in the same manner as the prohibition on returning an alien to face persecution. Asylum is a discretionary decision of the Attorney General. No alien, even one who satisfies the standard of "refugee," has a right to asylum, or a right to enter the United States. *See Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987) ("It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee.") (emphasis in original). If denied asylum, he may not enter; he may go elsewhere, or, in an extreme case, languish at our border. *Cf. Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (excluded alien detained at Ellis Island). But the command of section 243(h) is absolute: the alien shall not be returned to face persecution. That command cannot be circumvented by seizing the alien as he approaches our border, whether by land or by sea, and returning him to his persecutors.

WALKER, *Circuit Judge*, dissenting:

The plight of the Haitian plaintiffs in this case, whose desperation forces them onto the ocean in unseaworthy boats, escapes no one who considers the issues presently before us. I believe, however, that plaintiffs have already had a day in court on these issues and are collaterally estopped from seeking another. Even if they were not, plaintiffs cannot succeed in their challenge to the government's interdiction and repatriation policy implemented pursuant to a May 23, 1992 Executive Order. *See* Exec. Order 12,807, 57 Fed. Reg. 23,133 (1992) (the "May 23, 1992 Order"). Plaintiffs rely on § 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h) (Supp. 1992), and Article 33 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1954) ("Article 33"). These provisions, however, bind the United States only with respect to aliens who have physically reached our territory. They grant no rights to plaintiffs in this case who have been or will be interdicted on the high seas. Whatever the merits of the policy of interdiction and return, as part of the United States response to the foreign policy crisis precipitated by the fall of the Haitian government in September, 1991, and the ensuing mass migration of Haitians in boats, I sit not as a policymaker but as a judge. I believe that the law does not support plaintiffs' claim. I respectfully dissent from the opinion of the majority granting plaintiffs' request for injunctive relief.

I. *Collateral Estoppel*

The first question on this appeal is whether *Haitian Refugee Center v. Baker* collaterally estopps [*sic*]

plaintiffs from raising certain issues. *See Haitian Refugee Center, Inc. v. Baker*, 789 F. Supp. 1552 (S.D. Fla. 1991), *rev'd* 949 F.2d 1109, (11th Cir. 1991) (per curiam) (*"HRC v. Baker I"*), *on remand*, 789 F. Supp. 1579 (S.D. Fla. 1991), *rev'd*, 953 F.2d 1498 (11th Cir. 1992) (*"HRC v. Baker II"*), *cert. denied*, 112 S. Ct. 1245 (1992). "Under the doctrine of collateral estoppel . . . the judgment in [a] prior suit [between the parties or their privies] precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). "Once a party has fought out a matter in litigation with another party, he cannot later renew that duel." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948).

Collateral estoppel applies to class actions. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). Indeed, the important judicial interests in consistency, finality and economy that underlie the doctrine, *see Parklane Hoisery*, 439 U.S. at 326; 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4416 at 138-39 (1981) ("Wright & Miller"), apply with particular force in the class action setting. "The policy behind the class action device is, of course, to facilitate the final determination of numerous claims in one suit. This policy is not furthered by allowing subsequent collateral attacks by class members." *Garcia v. Board of Ed., Sch. Dist. No. 1*, 573 F.2d 676, 679 (10th Cir. 1978). Moreover, the government may well have relied on *HRC v. Baker* in instituting the major policy initiative set forth in the May 23, 1992 Order. This further accentuates the need for consistency and finality.

A. *Plaintiffs are collaterally estopped.*

Collateral estoppel "prevents the parties' relitigation of an issue that was (a) raised, (b) litigated, and (c) actually decided by a judgment in their prior proceeding." *Prime Management Co., Inc. v. Steinegger*, 904 F.2d 811, 816 (2d Cir. 1990). The *HRC v. Baker* judgment meets all three criteria. In *HRC v. Baker*, as in the current case, a class of Haitians sued officials of the United States government which, pursuant to Executive Order 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1991), *reprinted in* 8 U.S.C.A. § 1182, was "screening" interdictees to determine their refugee status. The *HRC v. Baker* plaintiffs claimed that the government's procedures did not accord them the full screening rights to which they were entitled under law. Pursuant to this claim, they argued that INA § 243(h) extends extraterritorially, Article 33 is self-executing, and that the Administrative Procedure Act accords them judicial review. The Eleventh Circuit, in upholding the government's limited screening procedures, decided each of these issues in the government's favor. *See HRC v. Baker* I, 949 F.2d at 1110; *HRC v. Baker* II, 953 F.2d at 1505-1506, 1509-10. These issues, which are present in the current case, were therefore "raised," "litigated" and "actually decided" in *HRC v. Baker*, and collateral estoppel should apply. *See Prime Management Co.*, 904 F.2d at 816. My colleagues, however, do not accept this position and I address each of their concerns in turn.

B. *Is the present class distinct from the* HRC v. Baker *Class?*

To begin with, the majority concludes that the two classes are different: "We do not believe that any of the sub-groups of plaintiffs could fairly be charac-

terized as a party to the Florida action; thus, the issue they present to us are not barred by collateral estoppel." Majority Op. at 11-12. I do not agree.

The *HRC v. Baker* class, as certified, consisted of:

> all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard Cutters or at Guantanamo Naval Base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

In the present case, the district court certified a class of "all Haitian citizens who have been or will be screened in." Since, under the interdiction policy, a plaintiff must be detained before he or she is screened in, it follows that the class of all those "who have been or will be screened in" is wholly contained within the class of all those "who are currently detained or will in the future be detained." The present class thus fits neatly within the *HRC v. Baker* class.

The majority, however, focuses on the terms "United States Interdiction Program." The panel states that the present plaintiffs "have been or will be interdicted pursuant to a different interdiction program. The one at issue in *HRC v. Baker* was a program of preliminary screening before return; the program put in place by the Kennebunkport Order is one of summary return without screening." The majority summarily concludes that "[t]his is a change sufficient to avoid the class definition in *HRC v. Baker*." Majority Op. at 12.

I cannot accept this artificial distinction. To begin with the obvious, it seems to me that the terms "United States Interdiction Program" refer to the

policy under which plaintiffs were interdicted and not the screening policy to which they were later subject. The term "interdiction program," as it is used elsewhere in the *HRC v. Baker* plaintiffs' complaint, is consistent with this reading. *See* Second Amended Complaint, *HRC v. Baker*, 789 F. Supp. 1552 (No. 91-2653-Civ), ¶ 2 ("Under an 'interdiction program,' the Coast Guard and the Immigration and Naturalization Service ('INS') intercept vessels on the high seas believed to be carrying Haitian aliens, many of whom meet the standard for political asylum and who seek refuge in our country."). Moreover, the majority neglects to mention that the two Executive Orders, which purportedly create two entirely separate programs, were issued pursuant to a single Proclamation dated September 29, 1981 and entitled "High Seas Interdiction of Illegal Aliens." Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981), *reprinted in* 8 U.S.C.A. § 1182 (West Supp. 1992). I read "United States Interdiction Program" to refer to the unitary program undertaken pursuant to Proclamation 4865. The *HRC v. Baker* complaint bears out this reading. *See* Second Amended Complaint, *HRC v. Baker*, 789 F. Supp. 1552 (No. 91-2653-Civ), ¶ 32 ("On September 29, 1981 the President issued Proclamation 4865 . . . which announced a program of 'interdiction: on the high seas of vessels transporting aliens.' "). The government's interdiction policy, which has continued unabated both before and after the May 23, 1992 Order, thus constitutes one program, not two.

Even if I could distinguish between a pre- and a post-May 23, 1992 "United States Interdiction Program," I would not find this distinction "sufficient to avoid the class definition in *HRC v. Baker*." Majority Op. at 12. Where the parties are in all material

respects the same and stand in an identical position vis-a-vis the issues, a purely formal distinction in the naming of the class will not enable a party to avoid issue reclusion. "Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, R.I. & P. Ry. Co. v. Shendel*, 270 U.S. 611, 620 (1926), 'Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different . . . and parties nominally different may be, in legal effect, the same.'" *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402 (1940); *see also St. Louis Typographical Union v. Herald Company*, 402 F.2d 553, 556 (8th Cir. 1968). In another formulation of this principle, it has been stated that a party is "privy" to another, and hence bound by issue preclusion, if he or she is "so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jefferson School of Social Science v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963) (citing cases); *see also Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 301 (7th Cir. 1985); *Gill and Duffus Serv., Inc. v. A.M. Nural Islam*, 675 F.2d 404, 405 n.3 (D.C. Cir. 1982); *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1303 (9th Cir. 1982); *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 95 & n.38 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977).

These principles require issue preclusion in the present case. The issues before us—the scope of INA § 243(h); the self-executing nature of Article 33; and judicial review under the APA—are identical to those before the *HRC v. Baker* court. Moreover, as a practical matter, the only asserted difference between the classes is that the *HRC v. Baker* class received some minimal screening rights prior to return, whereas the current plaintiffs receive none. The issues with which we are concerned, however, do not in any way turn on the existence or non-existence of a minimal screening. Nor does the minimal screening granted the *HRC v. Baker* plaintiffs have any bearing on the parties' incentive to litigate the issues. Thus, both classes stand in precisely the same legal position and assert the same legal interests with respect to the issues involved. Whether or not the identity of the parties varies slightly in form, it is the same in substance. *Sunshine Anthracite Coal*, 310 U.S. at 402. I therefore conclude that collateral estoppel applies. *Cf. Montana v. United States*, 440 U.S. 147, 159-61 (1979) (issue preclusion applies even where facts have changed if prior judgment not premised on those facts).

C. *Have There Been Intervening Changes in the Legal Context?*

The majority, without further explanation, concludes that "the Kennebunkport Order represents 'an intervening change in the applicable legal context'" which renders issue preclusion inapplicable. Majority Op. at 15. I believe that the panel opinion misapplies this exception to issue preclusion.

Section 28(2)(b) of the Restatement (Second) of Judgments (1982) states that relitigation of an issue is not precluded where "a new determination is warranted in order to take account of an intervening change in the applicable legal context . . . ." The paradigmatic case, as presented in the Restatement, is that of a taxpayer held liable for tax under a certain interpretation of the law, where that interpretation is

later abandoned in favor of another which would not require liability. If, after this "intervening change," the taxpayer once again challenges his liability, the Restatement advises that issue preclusion should not apply so that "the taxpayer will be treated in those years in the same way as other taxpayers . . . ." Restatement (Second) of Judgments, § 28 cmt. c. *See also Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948); 18 Wright & Miller § 4425 at 259-60.

The "intervening change" exception protects a party from being bound by a prior litigation where the legal grounds *upon which that prior litigation was resolved* have changed during the intervening period. In the present case, while the May 23, 1992 order no doubt constitutes a significant change in the lives of those affected by it, it has no bearing on the merits of the legal issues decided in *HRC v. Baker* and cannot constitute an "intervening change" in the law upon which that decision was grounded. Thus, the May 23, 1992 Order is not an "intervening change in the *applicable* legal context," Restatement (Second) of Judgments § 28(2)(b) (emphasis added), and does not enable plaintiffs to avoid issue preclusion.

D. *Would Issue Preclusion Result in Inequitable Administration of the Laws?*

Finally, the majority concludes that a new determination of the issues is necessary "to avoid inequitable administration of the laws." Restatement (Second) of Judgments § 28(2)(b). The panel believes that the Supreme Court may have premised its denial of certiorari in *HRC v. Baker* on the government's representation that it would bring screened-in individuals to the United States for further asylum proceedings. The government later deviated from this

representation by holding second interviews at Guantanamo Bay for Haitians with communicable disease, such as the HIV virus, *see Haitian Centers Council, Inc. v. McNary*, Nos. 92-6090, 92-6104, slip op. 4371, 4382 (2d Cir. June 10, 1992), and by inadvertently returning some screened-in Haitians to Haiti. The panel also makes the assertion, which I find unwarranted, that the May 23, 1992 Order further violated this representation by "permitt[ing] a policy, subsequently implemented, of no screening whatsoever." Majority Op. at 16. The panel concludes that, under these circumstances, application of collateral estoppel would inequitably deny plaintiffs the opportunity for Supreme Court review.

One problem with this argument is that plaintiffs are not entitled to certiorari, which is granted on a discretionary basis. But even if the argument were that the government had inequitably dampened plaintiffs' chances of attaining Supreme Court review, it seems to me that the proper redress is to be found in the Supreme Court, not this one. Plaintiffs have no cause to argue that this court should fail to apply collateral estoppel. After all, there is no dispute that they received full appellate court review in *HRC v. Baker*. Their argument must be that they were denied a full opportunity to gain *Supreme Court* review on the merits, and that that Court, in deciding whether to hear an appeal from our collateral estoppel ruling, should, for reasons of equity, take the case up on the merits as well. Equity does not require that we hesitate to apply collateral estoppel. In sum, I believe that the *HRC v. Baker* litigation operates as collateral estoppel with respect to the following issues: (1) whether INA § 243(h) applies extraterritorially, *see HRC v. Baker* II, 953 F.2d at 1509-10; (2) whether

Article 33 is self-executing, *see HRC v. Baker I*, 949 F.2d at 1110; and (3) whether the Administrative Procedure Act gives plaintiffs a right to judicial review, *see HRC v. Baker* II, 953 F.2d at 1503-1506. The *HRC v. Baker* court decided all three issues against plaintiffs.

II. *The Merits.*

The majority holds that section 243(h)(1) of the Immigration and Nationality Act and Article 33 of the Convention relating to the Status of Refugees support plaintiffs' request for injunctive relief. I believe that these provisions do not apply to aliens on the high seas. Thus, even if *HRC v. Baker* did not collaterally estop plaintiffs, I would dissent on the merits.

A. *Ambiguity in § 243(h)(1).*

Prior to 1980, INA § 243(h), 8 U.S.C.A. 1253(h) (1970), read:

> Withholding of deportation
>
> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), amended the provision to read, in pertinent part, as follows:

> (h) Withholding of deportation or return
>
> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h) (Supp. 1992).

The Supreme Court has pointed out that the 1980 amendments effected three important changes in § 243(h):

> The amendment (1) substituted mandatory language for what was previously a grant of discretionary authority to the Attorney General to withhold deportation after making the required finding; (2) substituted a requirement that the Attorney General determine that the 'alien's life or freedom would be threatened' for the previous requirement that the alien "would be subject to persecution," and (3) broadened the relevant causes of persecution from reasons of "race, religion or political opinion" to encompass "nationality" and "membership in a particular social group" as well.

INS v. Stevic, 467 U.S. 407, 421 & n.15 (1984).

The panel believes that the plain language of the provision effects a fourth major change, not noted by the Supreme Court: extension of the provision's reach beyond the United States territory. Prior to the 1980 amendments, INA § 243(h) applied only to those in deportation proceedings who were "within the United

States." *See Leng May Ma v. Barber*, 357 U.S. 185 (1958). The panel, however, concludes that the Refugee Act's addition of the words "or return," and its deletion of the phrase "within the United States," make § 243(h)(1) applicable to aliens outside the territorial United States. The majority believes that the plain language unambiguously supports this reading thereby foreclosing review of the legislative history. *See* Majority Op. at 19, 25-27.

I find the plain language ambiguous. While the majority correctly states that the § 243(h)(1) term "any alien," as defined at 8 U.S.C. § 1101(a)(3), contains no geographic restrictions, Majority Op. at 19, these words do not require the majority's position. Congress used the same term "any alien" in § 243(h) before the 1980 amendments where, at least since the 1958 *Barber* case, there has been no question as to its non-extraterritorial application. Moreover, § 243(h)(1), as amended in 1980, states that "[t]he Attorney General shall not deport . . . any alien," 8 U.S.C. § 1253(h)(1) (emphasis added). Yet no one could seriously contend (and the majority does not contend) that § 243(h)(1) proscribes the "deportation" of aliens on the high seas. As I shall have occasion to explain below, an alien can only be "deported," in the technical sense of that term, from United States territory. *See infra* at 16-18. The term "any alien" cannot have a different meaning in § 243(h)(1) depending upon whether it is the object of the verb "deport" or "return". The key question, and to me the only question of statutory interpretation necessary to decide this case, therefore, is whether § 243(h)(1) similarly prohibits "return" only from United States territory. If the term "return" does contain such a limitation, then the words "any alien" cannot alter it.

The majority acknowledges, as it has to, that the statute does not define where § 243(h)(1) prohibits "return" from. The panel concludes, however, that "what is important is the place 'to' which, not 'from' which, the refugee is returned." Majority Op. at 27. This reasoning fails on two grounds. First, "our immigration laws have long made a distinction" between those aliens within our territory, and those outside of it. *Barber*, 357 U.S. at 187. In light of this history, the majority errs by dismissing such distinctions as not "important." Secondly, the majority's approach flies in the face of the well-established principle that where the statute is silent on a key interpretive issue "we must look past the text to . . . [the] legislative history." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Congress' silence as to the location from which § 243(h)(1) prohibits return thus requires that we consult the legislative history.

Even if the plain language did unambiguously support plaintiffs' position I would find that "there is a 'clearly expressed legislative intention' contrary to that [plain] language." *United States v. James*, 478 U.S. 597, 606 (1986). Under either rationale, I believe that examination of the legislative history is necessary. I turn now to that task.

B. *The legislative history clarifies the word "return".*

The Refugee Act of 1980 did extend the scope of INA § 243(h), but not as broadly as the majority supposes. Briefly stated, the legislative history demonstrates that Congress intended, by means of the word "return," to expand the provision to encompass "excludable," as well "deportable," aliens. Excludable aliens, like deportables, are "physically present in the United States." *Li v. Greene*, 767 F. Supp. 1087, 1088

(1991). Thus, while Congress did broaden the provision's reach it did not expand it to aliens physically outside of United States territory. Section 243(h)(1) as amended does not cover aliens interdicted on the high seas such as the plaintiffs in this case who are neither deportable nor excludable.

1. *The terminology of immigration law.*

A proper understanding of § 243(h)(1) requires some familiarity with the concepts "deportation" and "exclusion" as used in immigration law. The basic distinction is straightforward. An alien who has "entered" the United States is subject to deportation proceedings. An alien "who is physically present in the United States, without making a legal entry," however, is subject to exclusion proceedings. *Li v. Greene*, 767 F. Supp. 1087, 1088 (1991); *see also, e.g., Leng May Ma v. Barber*, 357 U.S. 185, 187-88 (1958) (exclusion proceedings appropriate for alien who has not made legal entry even "though the alien is physically within the United States"); *Bertrand v. Sava*, 684 F.2d 204, 205 n.1 (2d Cir. 1982) (defining an excludable alien as one "who has reached our border but has not been formally permitted to enter the country. Even though physically present in the country, he is 'treated as if stopped at the border.'") (citation omitted); *Ledesma-Valdes v. Sava*, 604 F. Supp. 675, 680 (S.D.N.Y. 1985) ("Excludees, although physically present in the United States, are 'treated as if stopped at the border.'"). An alien who has not yet physically entered United States territory is, of course, subject neither to deportation nor exclusion proceedings.

To complicate matters a bit, deportation is sometimes referred to as "expulsion" and has occasionally

been used loosely to encompass both expulsion and exclusion proceedings. Use of the term deportation to encompass exclusion, however, "reflects none of the technical gloss accompanying its use as a word of art. . . ." *Barber*, 357 U.S. at 187; *see also Bertrand*, 684 F.2d at 205 n.1. For present purposes, we properly distinguish between "deportation" and "exclusion" as these different concepts are recognized in immigration law.

"Entry," the status which renders an alien subject to deportation as opposed to exclusion, involves:

> (1) a crossing into the territorial limits of the United States, i.e. physical presence; 2(a) an inspection and admission by an immigration officer or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint.

Correa v. Thornburgh, 901 F.2d 1166, 1171 (2d Cir. 1990) (quoting *Matter of Ching and Chen*, Interim Decision 2984, at 3 (BIA 1984)). Thus, in practical terms, if the government wishes to remove an alien whom it has inspected and admitted at the border, or who has evaded inspection, and who is in United States territory "free[] from official restraint," *id.*, it may do so only through deportation proceedings. Where the government has detained the alien at a border crossing, an airport or on a ship, physically within United States territory or territorial waters but without an "entry" having been effected, it may remove him or her pursuant to an exclusion hearing. This is true even where the Attorney General has "paroled" a detainee into the country. *See* 8 U.S.C. § 1182(d)(5). In the eyes of the law, such a person is deemed "stopped at the border,"

Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953), and is not "within the United States," *Barber*, 357 U.S. at 189, even though physically present. The distinction is important because, as we have noted, "[d]eportation proceedings are generally more favorable to the alien than exclusion proceedings." *Correa*, 901 F.2d at 1171 n.5; *see also Maldonado-Sandoval v. INS*, 518 F.2d 278, 280 n.3 (9th Cir. 1975).

2. *The 1980 Amendments to INA § 243(h).*

Prior to 1980, § 243(h) protected a refugee, in the Attorney General's discretion, only against "deportation . . . to any country in which in his opinion the alien would be subject to persecution. . . ." 8 U.S.C.A. § 1253(h) (1970). In *Leng May Ma v. Barber*, 357 U.S. 185, 187-89 (1958), the Supreme Court accordingly held that § 243(h) covered only deportable, and not excludable, aliens. *See also INS v. Stevic*, 467 U.S. 407, 415 (1984).

The Refugee Act of 1980 opened up § 243(h) to excludables. The House Report explains quite clearly that "*section 203(e)* [of the Refugee Act] amends section 243(h) of the Act, relating to withholding of deportation, to require (with some exceptions) the Attorney General to withhold deportation of aliens who qualify as refugees *and who are in exclusion as well as deportation proceedings.*" H.R. Rep. No. 608, 96th Cong., 1st Sess., 30 (1979) (emphasis added). This piece of legislative history goes a long way towards answering the interpretive question before us. It demonstrates that Congress intended to broaden § 243(h)(1) to apply to excludables, but did not extend the provision to aliens outside United States territory.

In addition, the reference to excludables clarifies the meaning of "return." To bring excludables within the terms of § 243(h) Congress had to change the statutory language in two ways. First, it had to delete the words "within the United States" which, the Supreme Court had held, covered only deportables. *See Barber*, 357 U.S. at 188. Secondly, it had to modify the word "deportation" since this term, too, limited the scope of § 243(h) to deportables, not excludables. *Id.* at 187-90. To signify the intended broader scope Congress therefore added the words: "or return." Statutes and case law had previously used "return" in this manner. *See* 8 U.S.C.A. § 1182(a)(26) (1970) (discussing "return [of excludable alien] to country from which he came"); 8 U.S.C.A. § 1182(d)(6) (1970) ("[t]he Attorney General shall prescribe conditions . . . to control and regulate the admission and return of excludable aliens. . . ."); *Barber*, 357 U.S. at 187 (describing "the return of excluded aliens from the country"); *United States v. Murff*, 176 F. Supp. 253, 256 & n.13 (S.D.N.Y. 1959) ("The return of aliens who seek and who are denied admission into the United States is governed by the exclusion provisions, whereas the deportation of aliens . . . is governed by the expulsion provisions of the act."). Thus, just as "deport" refers to deportables, Congress intended "return" to refer to excludables.

The legislative history provides additional support for this reading. For example, Congress' decision in the 1980 amendments to continue to address the provision to the "Attorney General," 8 U.S.C. § 1253(h)(1) (Supp. 1992), indicates that § 243(h)(1) as amended was to be applied to deportables and excludables, aliens over which the Attorney General had operational jurisdiction, and not to other refugees or

potential refugees outside United States territory who might be encountered by other United States government personnel, be they Coast Guard, military, or the like.

Moreover, the INA grants excludables and deportables the right to seek judicial review but does not provide review for aliens outside United States territory, *see* 8 U.S.C. §§ 1105a, 1157, and those outside United States territory will not likely gain review under the APA, *see HRC v. Baker*, 953 F.2d at 1505-1507. It is unlikely that Congress would have granted rights under § 243(h)(1) to aliens outside the United States without providing them a clear means to enforce these rights. This further supports a limitation of § 243(h)(1) relief to excludables and deportables to whom judicial review is available.

The legislative history also suggests that the territorial reach of § 243(h)(1) is co-extensive with § 208(a), a provision which establishes asylum procedures for "alien[s] physically present in the United States or at a land border or port of entry," i.e. deportables and excludables. 8 U.S.C. § 1158(a) (Supp. 1992). Under the heading "Asylum and Withholding of Deportation," the House Report states that

> Since 1968, the United States has been a party to the United Nations Refugee Protocol which incorporates the substance of the 1951 Convention of Refugees which seeks to insure fair and humane treatment for *refugees within the territory of the contracting states*. . . . The Committee Amendment conforms United States statutory law to our obligations under Article 33 [of the Convention] in two of its provisions: . . . section 208 . . . [and] section 243(h).

H.R. 608 at 17 (emphasis added). Thus, sections 208 and 243(h), respectively, meet the United States' international obligation to provide asylum procedures for, and not to deport or return, "refugees within the territory of the contracting states." *Id.* Case law, and a leading commentator, also read § 243(h)(1) as co-extensive with § 208(a). *See HRC v. Baker*, 789 F. Supp. at 1575 (citing INA § 208(a) for the proposition that plaintiff's claims under INA § 243(h) "must fail because the statutory rights and protections asserted are reserved, by the very terms of the statute, to aliens within the United States"); C. Gordon & S. Mailman, 1 *Immigration Law and Procedure*, § 1.03[6][a] at 1-33 (1991) ("[r]efugee status is available [pursuant to INA § 207] to individuals screened and selected outside the United States, while asylum [pursuant to INA § 208] and withholding of deportation [pursuant to INA § 243(h)] are remedies available to those who have already reached our shores or borders and wish to secure permission to stay.")

C. *Article 33 does not create an extraterritorial obligation.*

Article 33 of the Convention relating to the Status of Refugees, 189 U.N.T.S. 150 (1954), which the United States ratified when it acceded to the 1967 Protocol relating to the Status of Refugees, 19 U.S.T. 6223 ("Protocol"), further supports the conclusion that Congress intended to limit § 243(h)(1) to deportables and excludables who are within United States territory.

The Supreme Court has stated that "if one thing is clear from the legislative history . . . the entire 1980 [Refugee] Act, it is that one of Congress' primary pur-

poses was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Specifically, Congress intended § 243(h)(1), as amended, to be coextensive with Article 33 of the Convention. Plaintiffs concede this point, *see* Plaintiffs Brief at 14 ("Congress intended § 243(h) to have the same meaning as Article 33 of the Refugee Convention"), the legislative history overwhelmingly supports it, *see* S. Rep. No. 96-256 at 20, *reprinted in* 1980 U.S.C.A.N. at 161 (section 243(h) "is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol"); H.R. 608 at 17 ("[t]he Committee Amendment [to § 243(h)] conforms United States statutory law to our obligations under Article 33"), and the Supreme Court has consistently taken this view, *see INS v. Doherty*, 112 S. Ct. 719, 729 (1992) (Scalia, J., concurring); *INS v. Stevic*, 467 U.S. 407, 421 (1984). Thus, if Article 33 extends only to aliens within the territory of a contracting state, as I believe it does, this powerfully supports a parallel reading of § 243(h)(1). In turning to Article 33, I also address plaintiffs' (and the majority's) erroneous contention that Article 33 itself creates extraterritorial obligations for the United States. *See* Majority Op. at 27-40.

Article 33 of the Convention reads as follows:

> Article 33—Prohibition of expulsion or return ("*refoulement*")
>
> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The majority's "plain language" approach to the word "return" as used in Article 33 treads the same path as its analysis of INA § 243(h)(1), *see* Majority Op. at 30-31, and leaves the same unresolved question as to where the Article prohibits "return" from. Unlike INA § 243(h)(1), however, Article 33 includes next to the word "return" the explanatory bracketed French term "*refouler*". *Refouler* is not susceptible to a plain language analysis for, as the majority points out, French dictionaries provide conflicting definitions. Majority Op. at 33. The majority itself fails to settle on a meaning for this word, concluding that it is "ambiguous." Majority Op. at 39. We must, therefore, turn to the legislative history of Article 33 in order to determine the meaning of "*refouler*," and consequently of "return".

The Netherlands delegate, speaking at the second and final reading of the Draft Convention, graciously provides a precise definition:

> Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that *the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" ("refoulment") related to a refugee already within the territory but not yet resident there.* According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migrations across frontiers—or of attempted mass migrations.

He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.

At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.

In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.

There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be placed on record.

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-Fifth Meeting, U.S. Doc. A/Conf. 2/SR.35 at 30 (1951) (emphasis added).

The Netherlands delegate's comments unambiguously restrict the terms "expel" and "return (*'refouler'*)" to aliens physically within the territory of the contracting state. Moreover, the definition of "return (*'refouler'*)" as "already within the territory but not yet resident there" appears to correspond

to American usage of the term "excludable" which is "*synonymous with non-resident* . . . [and] describe[s] the alien who has reached our border but has not been formally permitted to enter the country." *Bertrand*, 684 F.2d at 205 n.1 (emphasis added).

While the majority cannot point to any lack of clarity in the statement of the Netherlands delegate, it finds ambiguous the "ruling" of the Conference President "that the interpretation given by the Netherlands's representative should be placed on the record." U.S. Doc. A/Conf. 2/SR.35 at 30. Judge Edwards, concurring in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 840 (D.C. Cir. 1987), has found that this ruling constituted an "agree[ment]" among the delegates. While acknowledging Judge Edwards' "thoughtful and scholarly concurrence," the majority concludes that it is "an equally-fair reading to see this passage as simply recording the views of a dissenting member." Majority Op. at 39.

I am in accord with Judge Edwards. The President of the Conference premised his ruling on "[t]here being no objection," a finding which alone would indicate agreement. Additionally, the Conference recorded the Netherlands delegate's "interpretation," not his "views." Indeed, I cannot fathom why a member would seek to have his "views" formally recorded since that is accomplished by the transcript itself. Thus, I conclude with Judge Edwards that the Conference formally recorded the delegate's "interpretation" so as to show its agreement.

The discussion which immediately followed the President's ruling clears up any residual ambiguity:

MR. HOARE (United Kingdom) remarked that the Style Committee had considered that the word "return" was the nearest equivalent in

English to the French term "*refoulement*". He assumed that the word "return" as used in the English text had no wider meaning.

The PRESIDENT suggested that in accordance with the practice followed in previous Conventions, the French word "*refoulement*" ("*refouler*" in verbal uses) should be included in brackets and between inverted commas after the English word "return" wherever the latter occurred in the text.

He further suggested that the French text of paragraph 1 should refer to refugees in the singular . . . .

The two suggestions made by the President were adopted unanimously.

U.N. Doc. A/Conf. 2/SR.35 at 30-31 (emphasis added).

These statements evidence the delegates' unanimous agreement that "return ('*refouler*')" be limited to non-resident aliens within a contracting state's territory. Only by reading Mr. Hoare's "*refouler*" as different from Baron van Boetzelaer's can one escape this conclusion. Both, however, were attending the same conference, and Mr. Hoare, who spoke immediately following the Baron, expressed no disagreement with his interpretation. Thus, there is no basis to suggest that they were interpreting the word differently. This negotiating history is to me unambiguous. Moreover it is, to my knowledge, the only document which directly explains the placement of "refouler" in Article 33; consequently, it is the linch-pin to understanding the word "return" as utilized in that provision.

Article 40 of the Convention, incorporated by reference in Article 7.4 of the Protocol, *see Protocol*, 19 U.S.T. at 6228, supports the same, limited reading of Article 33. Article 40, entitled "Territorial application clause," provides that

> (1) Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State Concerned.

189 U.N.T.S. 150. Thus, pursuant to Article 40, the Convention does not automatically reach beyond a contracting state's sovereign territory even to those other territories, such as colonies, which it administers. Nothing in Article 40 exempts Article 33 from this proviso. It follows that Article 33 does not, as the majority contends, extend automatically to aliens throughout the globe. I note parenthetically that the United States has taken no action pursuant to Article 40.

I conclude that Article 33, which plaintiffs concede to have the same territorial reach as § 243(h)(1), applies only to aliens physically within the territory of a given state. Most commentators adopt this view. *See* Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 Recuil Des Cours (Hague Academy of International Law) 287, 318 (1976) (only refugees "already within the territory of the Contracting State" may avail themselves of right to *non-refoulement*); Weis, *The United Nations Declaration of Territorial Asylum*, 7 Canadian Yearbook Int'l L., 92, 123-24 (1969) (adopting Netherlands

delegate's interpretation of "expel" and "return"); Note, *The Right to Asylum Under United States Law*, 80 Colum. L. Rev. 1125, 1126-27 (1980) (rights under Article 33 of the Convention do[] not extend to refugees outside the contracting country's borders.").

D. *Congress has authorized the President's policy.*

Plaintiffs assert that even if the President's actions do not contravene § 243(h)(1) and Article 33, they are nonetheless without legal authority. The government, in response, relies on INA §§ 212(f) and 215(a)(1), which read as follows:

> § 1182(f) [INA § 212(f)] Suspension of entry or imposition of restrictions by President. Whenever the President finds that the entry of any aliens or of any class of aliens would be detrimental to the United States, he may . . . suspend the entry of all aliens . . . or impose on the entry of aliens any restrictions he may deem appropriate."
>
> § 1185(a)(1) [INA § 215(a)(1)]. Travel Control of citizens and aliens
>
> (a) Restrictions and prohibitions. Unless otherwise ordered by the President, it shall be unlawful—(1) for any alien to depart from or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe . . . .

The majority dismisses these provisions on the grounds that the President's authority to regulate "entry" does not permit him to "return" refugees to Haiti. Majority Op. at 41. The majority's attempt to distinguish between entry restrictions and repatriation, however, does not withstand scrutiny. In the context of this case the two policies are inextricably intertwined. As the record makes clear, most Haitians seeking entry set sail on the 600 mile ocean voyage in overcrowded, unseaworthy craft with a demonstrable risk to life (evidenced in one case by a May 17, 1992 capsizing with a loss of half of the boat's forty passengers). The President cannot simply draw a "line in the sea" over which no Haitian vessel may cross. To do so would risk additional sea disasters with the attendant loss of life. Faced with this difficult policy choice which, I note, courts are without competency to evaluate, *Harisiades v. Shaughnessy*, 342 U.S. 304, 319 (1936), the President has determined that the only feasible way to regulate "entry" is to promptly interdict and repatriate Haitian vessels. Congress' broad delegation of the power to "impose on the entry of aliens any restrictions [the President] may deem appropriate," 8 U.S.C. § 1182(f), and to establish "reasonable . . . orders" regulating entry, 8 U.S.C. § 1185(a)(1), easily encompass this policy choice.

Insofar as the majority relies on the assertion that the government may be interdicting Haitians seeking entry to countries other than the United States, Majority Op. at 42, I note that this issue is not properly before our Court. As plaintiffs themselves state: "[t]his case . . . [involves] defendants' blanket decision to implement an immigration policy . . . in massive disregard *for* [*plaintiffs'*] *asylum claims.*" Plaintiff's Brief at 30 (emphasis added). The plaintiffs in this case are seeking asylum in, and thus "entry" into, the United States. This litigation does not properly present the question of aliens seeking passage to other nations.

Accordingly, INA § 212(f) and § 215(a)(1) fully authorize the challenged Presidential action. Even if Congress had not authorized the May 23, 1992 policy, I would find sufficient authority in the President's inherent powers over immigration, *see Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), and foreign affairs, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

E. *Conclusion.*

The legislative history of § 243(h)(1), including as it must Article 33 and its negotiating history, clears up the textual ambiguities in this case and demonstrates conclusively that the United States' duty of *non-refoulement* pertains only to deportable and excludable refugees physically present in its territory and does not reach those, such as plaintiffs, who are on the high seas. Thus, the INA does not prohibit the May 23, 1992 policy; rather, it authorizes it in §§ 212(f) and 215(a)(1). "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Faced with such combined Presidential and Congressional authority, I would deny plaintiffs' request for injunctive relief.

I am strengthened in this conclusion by the well-established judicial reticience, in the absence of a clear legal mandate, to grant relief which would undermine the President's authority in foreign affairs. *See Dep't of Navy v. Egan*, 484 U.S. 518, 529-30 (1988); *Haig v. Agee*, 453 U.S. 280, 290-92 (1981);

Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 109-11 (1948); *see generally, United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936). The interdiction and return policy embodied in the May 23, 1992 Order was not confined to an immigration crisis but was squarely in the foreign affairs arena. To be sure, the dramatic surge in Haitian migration following the September 30, 1991 coup that overthrew the democratically elected government of Bertrand Aristide and that led to 34,000 interdictions from October 1991 through May 1992 (as compared with 25,000 interdictions over the previous decade) precipitated an immigration crisis of substantial dimension. However, according to Under Secretary of State Kantor in a May, 1992 affidavit filed in this action, the massive migration outflow also gave the *de facto* Haitian government leverage against those nations who, like the United States, were pressing for a return to democracy in Haiti.

In a January 1992 affidavit filed in the *HRC v. Baker* litigation, Assistant Secretary of State Aronson cited "credible" reports that the *de facto* Haitian government "intend[ed] to encourage massive outmigration" in order to pressure the United States and the Organization of American States "into dropping their concerted efforts . . . to restore constitutional democratic government in Haiti." Thus, the May 23, 1992 Order was part of the United States' response to a foreign policy crisis, and accordingly deserves "the utmost deference." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Finally, while I do not rely on it because I see no need to do so in light of the clear purposes underlying

the 1980 amendments to § 243(h)(1), I note that the presumption against extraterritorial application, of domestic legislation also weighs against plaintiffs' claim. *See EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1230 (1991).

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1789, 1790—August Term 1991

(Argued: May 13, 1992 Decided: June 10, 1992)

Docket Nos. 92-6090 and 92-6104

HAITIAN CENTERS COUNCIL, INC.; NATIONAL COALITION FOR HAITIAN REFUGEES; IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF NEW HAVEN, CONNECTICUT; DR. FRANTZ GUERRIER; PASCAL HENRY; LAURITON GUNEAU; MEDILIEU SOREL ST. FLEUR; DIEU RENEL; MILOT BAPTISTE; JEAN DOE; ROGES NOEL, on Behalf of themselves and all others similarly situated; A. IRIS VILNOR, on Behalf of herself and all others similarly situated; MIREILLE BERGER; YVROSE PIERRE; MATHIEU NOEL, on Behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLEES,

—*v.*—

GENE MCNARY, Commissioner, Immigration and Naturalization Service; WILLIAM P. BARR, Attorney General; Immigration and Naturalization Service; JAMES BAKER, III, Secretary of State; Rear Admiral ROBERT KRAMEK, Admiral KIME, Commandants, United States Coast Guard; Commander, U.S. Naval Base, Guantanamo Bay, DEFENDANTS-APPELLANTS.

Before:

CARDAMONE, PIERCE, and MAHONEY,
Circuit Judges.

PIERCE, *Circuit Judge*:

The Immigration and Naturalization Service ("INS") and various United States governmental officials appeal from an order entered in the United States District Court for the Eastern District of New York, Sterling Johnson, Jr., *Judge*, granting a preliminary injunction, and from a subsequent clarifying order. For the reasons set forth below, we affirm, as modified.

BACKGROUND

General Background

In September 1981, then-President Ronald Reagan determined that "[t]he ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States." Proclamation No. 4,865, 46 Fed. Reg. 48,107 (1981), *reprinted in* 8 U.S.C.A. § 1182 note (West Supp. 1992). President Reagan, by Executive Order 12,324 ("Executive Order"), authorized the Secretary of State "to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea." Exec. Order 12,324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C.A. § 1182 note (West Supp. 1992).

On September 23, 1981, the United States entered into an agreement with Haiti for "the establishment of a cooperative program of interdiction and selective

return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti." Agreement Between the United States of America and Haiti, September 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241. Under this agreement, United States authorities are permitted to board a "Haitian flag vessel" to make inquiries to determine the registry, condition and destination of the vessel and the status of those on board the vessel. If the United States determines that a violation of its laws or the laws of Haiti has been committed, it may detain the vessel and those found on board. The United States is permited to return the detained vessel and persons to a Haitian port, or if circumstances permit, release such vessel and migrants on the high seas to representatives of the Haitian government. The agreement provided that the United States "does not intend to return to Haiti any Haitian migrants whom United States authorities determine to qualify for refugee status." In addition, the United States received assurances from Haiti that Haitians returned to their country would not be subject to prosecution for illegal departure.

In September 1981, the United States Coast Guard began interdicting vessels carrying Haitian aliens. Generally, under the interdiction program, INS officers interview interdicted Haitians to determine if there are any indications that a person might qualify as a "refugee." The purpose of this process, known as "pre-screening," is to determine whether the interdicted alien has a "credible fear of persecution." This process was designed to take place when the interdicted aliens are taken into custody on the Coast Guard cutters on the high seas. Those individuals

found to have a credible fear of persecution if returned to Haiti are "screened in," and are eligible for transfer to the United States to pursue an asylum claim. Those individuals found not to have a credible fear are "screened out," and are repatriated to Haiti.

On September 30, 1991, the democratically elected government of Haiti was overthrown in a military coup, and its President, Jean-Bertrand Aristide, was forced into exile. Following the coup, reports surfaced of human rights violations by the military in Haiti. These alleged violations included killings, torture, arbitrary arrests without a warrant and the destruction of property. Allegedly, the Haitian miliary has targeted President Aristides' political supporters for threats, intimidation and persecution. Following the coup, the United States joined other nations in announcing the imposition of economic sanctions against Haiti.

Since the coup, thousands of people have fled from Haiti, mostly by boat. As a result of this substantial increase in migration from Haiti, the number of interdictions also increased. Following the coup, the United States temporarily suspended repatriations under the interdiction program. However, as of November 18, 1991, the United States resumed repatriations.

The Baker Litigation

On November 19, 1991, the Haitian Refugee Center, Inc. ("HRC"), filed a complaint in the United States District Court for the Southern District of Florida challenging aspects of the interdiction program and seeking declaratory and injunctive relief (the "Florida Action"). *See Haitian Refugee Center,*

Inc. v. Baker, 953 F.2d 1498, 1502-03 (11th Cir.) (per curiam), *cert. denied*, 112 S. Ct. 1245 (1992). Named as defendants were: James Baker III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; Gene McNary, Commissioner, Immigration and Naturalization Service; the United States Department of Justice; the Immigration and Naturalization Service; and the United States ("defendants in the Florida Action"). The Florida Action complaint asserted claims allegedly arising under the Exectuive Order, international law, the United Nations Protocol Relating to the Status of Refugees, United States immigration statutes and the fifth amendment. More specifically, HRC maintained that the INS had failed to comply with its own guidelines for the identification of refugees, promulgated pursuant to the Executive Order, and, thus violated the rights of the interdicted Haitians. On that same day, the district court granted HRC's application for a temporary restraining order to maintain the *status quo*. This order precluded the defendants in the Florida Action from repatriating Haitians held on board United States vessels and held at the United States Naval Base, Guantánamo Bay, Cuba.

Following expedited discovery, HRC filed a second amended complaint and supplemental pleading adding claims on behalf of a putative class of Haitian plaintiffs. In addition to the claims asserted in the initial complaint, the second amended complaint alleged claims under the first amendment and the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1988) ("APA"). More specifically, the second amended complaint alleged, *inter alia*, that the Flor-

ida Action defendants had denied the HRC access to the interdicted Haitians and argued that such denial was a violation of the first amendment. In addition, the second amended complaint claimed that the INS' interviewing process was in violation of the APA. In an order dated December 3, 1991, the district court determined that the second amended complaint could be maintained as a class action. On that same day, the court granted a motion for a preliminary injunction, finding that there was a substantial likelihood that the plaintiffs in the Florida Action would prevail on the merits of HRC's first amendment claim and the Haitian plaintiffs' claims under the Protocol. The district court concluded that the fifth amendment claims of the Florida Action plaintiffs "must fail." The defendants appealed.

On December 17, 1991, the Eleventh Circuit dissolved the preliminary injunction, finding it to be overly broad with regard to HRC's first amendment claim, and remanded with instructions to dismiss the Haitian plaintiffs' claims under the Protocol. *Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109, 1111 (11th Cir. 1991) (per curiam). Later that evening, the district court issued a temporary restraining order based upon a reconsideration of the claims of the plaintiffs in the Florida Action under the APA, whereupon, the Eleventh Circuit stayed that order pending appeal. *Haitian Refugee Center, Inc. v. Baker*, 950 F.2d 685, 687 (11th Cir. 1991) (per curiam).

On December 20, 1991, the district court entered an order granting the plaintiffs in the Florida Action a limited preliminary injunction on HRC's first amendment claim. This order was supplemented by an order entered December 23, 1991 based upon the claims

under the APA. These orders were stayed pending appeal.[1] On February 4, 1992, the Eleventh Circuit dismissed the appeal from the December 17 order as moot, and vacated the December 20 and December 23 orders. Further, the Eleventh Circuit remanded the case with instructions that the district court dismiss the complaint for failure to state a claim upon which relief could be granted. *See Baker*, 953 F.2d at 1515. On February 24, 1992, the Supreme Court denied the Florida Action plaintiffs' application for a stay of the mandates and denied the Florida Action plaintiffs' petition for a writ of certiorari. *Haitian Refugee Center, Inc. v. Baker*, 112 S. Ct. 1245 (1992).

The Present Litigation

On March 18, 1992, the plaintiffs herein filed a complaint in the United States District Court for the Eastern District of New York (the "New York Action"). Named as defendants are: Gene McNary, Commissioner, Immigration and Naturalization Service; William P. Barr, Attorney General; Immigration and Naturalization Service; James Baker III, Secretary of State; Rear Admiral Robert Kramek and Admiral Krime, Commandants, United States Coast Guard; and Commander, United States Naval Base, Guantánamo Bay.

The plaintiffs in the present litigation are: Haitian Centers Council, Inc.; the National Coalition for Haitian Refugees, Inc.; Immigration Law Clinic of the Jerome N. Frank Legal Services Organization of New Haven, Connecticut (collectively the "Haitian Service

[1] The district court stayed the December 23 order. On January 31, 1992, the Supreme Court stayed the December 20 order.

Organizations"); several "screened in" Haitians on behalf of themselves and others similarly situated (" 'screened in' plaintiffs"); several "screened out" Haitians on behalf of themselves and others similarly situated (" 'screened out' plaintiffs"); and several immediate relatives of Haitians detained at Guantánamo Bay on behalf of themselves and others similarly situated (" 'immediate relative' plaintiffs").

The complaint, *inter alia*, challenged the refusal by the defendants in the New York Action to allow the Haitian Service Organizations to have access to the Haitian migrants on board Coast Guard cutters and at Guantánamo Bay for the purpose of providing them "legal counsel, advocacy, and representation" as a violation of the first amendment. In addition, in the New York Action, the complaint alleged that current governmental conduct under the interdiction program was in violation of United States immigration statutes, the fifth amendment, the APA, certain treaties and international agreements and executive directives.

On March 27, 1992, following oral argument, the district court in the New York Action granted the plaintiffs' motion for a temporary restraining order. The defendants argued that the rulings in the Florida Action precluded prosecution of the claims asserted by the New York Action plaintiffs; the district court responded that it agreed that the Florida Action rulings precluded assertion of the "screened out" plaintiffs' claims. With regard to the Haitian Service Organizations, the "screened in" plaintiffs, and the "immediate relative" plaintiffs, the court ruled that their claims were not barred by the Florida Action rulings.

On April 7, 1992, after conducting a hearing, the court granted the application of the plaintiffs in the New York Action and issued a preliminary injunction ("April 7 order"). The district court made, *inter alia*, findings of fact as set forth below.

The United States operates a naval base at Guantánamo Bay, Cuba. The area comprising the base is occupied pursuant to a lease between the United States and Cuba entered into in 1903, and amended by a 1934 treaty. The district court found that the United States base at Guantánamo Bay is a "relatively open base." Besides military personnel stationed there, there are "foreign nationals," civilian contractors of various nationalities and civilian United States employees present on the base.

The district court further found that, under the interdiction program, the Coast Guard has taken Haitian aliens interdicted on the high seas into custody and transported them to Guantánamo Bay. The Haitian aliens at Guantánamo Bay live in camps surrounded by razor wire fences. No Haitian alien is free to leave Guantánamo Bay to travel to any country other than Haiti, even at their own expense. They are not allowed access to telephones. Although the United States officials at Guantánamo Bay have provided the Haitian aliens with various services including educational programs, medical care and religious services, they have denied the aliens access to legal services. Congressmen, clergymen, church groups, and members of the press have been allowed access to the base and the Haitian aliens.

Further findings made were: under the interdiction program, INS officers at some point interview interdicted Haitians to determine whether they have a

"credible" fear of political persecution if returned to Haiti. The district court found that those determined to have a credible fear are "screened in," and are to be brought to the United States so that they may pursue asylum claims. Those found not to have a credible fear are "screened out," and are to be repatriated to Haiti. Repatriated Haitians face political persecution and even death upon their return.

The district court also found that following the rulings of the Eleventh Circuit in the Florida Action, the government defendants therein, in a memorandum submitted to the Supreme Court in opposition to the plaintiffs' petition for certiorari, explicitly represented that "screened in" individuals would be brought to the United States so that they could file applications under the Immigration and Nationality Act ("INA") for asylum. Five days after the Supreme Court denied certiorari in the Florida Action, the defendants in the Florida Action changed this policy. On February 29, 1992, the General Counsel of the INS, Grover Joseph Rees, issued a memorandum regarding second interviews of "screened in" Haitians who have been determined to have a communicable disease and thus are subject to medical exclusion under the INA. The district court found that the government tests all Haitian aliens who have been "screened in" to determine whether they have a communicable disease such as the HIV virus. According to the Rees memorandum, "screened in" Haitian aliens who have been found to have a communicable disease are to be given a second interview to determine if they have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The memorandum also

states that this interview should "be identical in form, and substance or nearly so as possible, to those conducted by asylum officers to determine whether asylum should be granted to an applicant already in the United States." However, while asylum applicants in the United States may have attorneys present during their asylum interviews, the "screened in" Haitians subject to a second interview are not permitted access to an attorney during their second interview at Guantánamo Bay.

The district court found: when the INS officers began conducting second interviews, the Haitian aliens including the "screened in" plaintiffs herein began to seek the assistance of counsel. According to the deposition testimony of INS officers at Guantánamo Bay, the presence of attorneys during the second interviews could be useful, would be feasible and would not interfere with the interviewing process. Thirty four "screened in" Haitians who had tested positive for HIV and had failed to establish a "well-founded" fear of persecution during a second interview at Guantánamo Bay would have been repatriated absent the temporary restraining order. In addition, INS officials at Guantánamo Bay lost the records of a number of Haitian aliens and, consequently, some Haitian aliens had to be re-screened. After stating its findings of fact, the district court proceeded to draw conclusions of law. As an initial matter, it ruled that the claims of the "screened in" plaintiffs, the "immediate relative" plaintiffs, and the Haitian Service Organizations were not precluded by the Florida Action. Addressing the legal standard for the issuance of a preliminary injunction, the court determined that the "screened in" plaintiffs and the plaintiffs comprising

the Haitian Service Organizations had made a showing of irreparable harm by a preponderance of the evidence. It also concluded that there were serious questions going to the merits with regard to the Hatian Service Organizations' first amendment claim and the "screened in" plaintiffs' fifth amendment claim, but it found that the "screened in" plaintiffs could not state statutory claims under the INA. The court assessed the balance of hardships, and found that they tipped decidedly in favor of the plaintiffs. The court thus concluded that the standards for the issuance of a preliminary injunction had been satisfied, although it reserved judgment of several claims raised in the complaint. In addition, the court conditionally certified as a class the "screened in" plaintiffs.[2]

The district court in the New York Action granted the plaintiffs' application for a preliminary injunction on April 7, 1992. On April 8, 1992, the court denied the defendants' motion to stay the April 7 order. At that time, addressing a question as to whether serious questions going to the merits was the proper legal standard for the issuance of a preliminary injunction when the government was the responding party, the court stated that even if the

[2] The district court stated: "Although the Screened In Plaintiff's motion for class certification is granted at this time, because the defendant challenges certain of plaintiff's factual allegations, I will permit them to conduct discovery and then this court will hold a hearing to ascertain whether the class certification herein granted should be modified."

Although the district court addressed the preclusive effect of the Florida Action as to the "screened out" plaintiffs and the "immediate relative" plaintiffs, it did not formally address the issue of class certification with regard to either group.

appropriate standard were "likelihood of success on the merits," that standard also had been satisfied.

On April 14, 1992, this Court denied the defendants' motion for a stay of the April 7 order, but granted an application to expedite the appeal. On April 15, 1992, the district court issued an order to "clarify the relief granted in the [April 7] Memorandum and Order." Under this order, the New York Action defendants were enjoined from:

> (a) denying the Haitian Service Organizations immediate access, on Guantanamo, to any member of the class of Screened In Plaintiffs subject to reasonable time, place and manner limitations (regardless of whether any such Screened In Plaintiff has been furnished with an exact date and time for interview) for the purpose of providing them legal counsel, advocacy and representation;
>
> (b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Screened In Plaintiffs who has been denied an opportunity to communicate with counsel; and
>
> (c) repatriating any member of [the] class of Screened In Plaintiffs who was subjected to a second interview at which time s/he was screened out, until such time as such individual is afforded an opportunity to communicate with Haitian Service Organizations and given another interview thereafter.
>
> Notwithstanding paragraphs (b) and (c) above, the Government may, at any time, transport members of the Screened In Plaintiff class to the mainland United States in accordance with the Government's represetations to this court.

The defendants in the New York Action filed a notice of appeal from this order on April 18, 1992. The New York Action defendants also moved for a stay of the April 15 order as to paragraph (a). The district court denied the defendants' application. On April 17, 1992, this Court denied an application by the defendants for a stay. On April 22, 1992, the Supreme Court granted the defendants' application for a stay of the preliminary injunction under the April 7 order, as clarified by the April 15, order, pending disposition of the appeal by this Court.

DISCUSSION

Preclusive Effect of the Florida Action

On appeal, the defendants in the New York Action (hereinafter "appellants") claim, *inter alia*, that the district court erred in concluding that the "screened in" plaintiffs' fifth amendment claims were not barred by the Florida Action, and that the court erred in issuing its preliminary injunction.

The appellants argue that the Florida Action resolved the question of whether the fifth amendment confers procedural rights upon aliens abroad seeking to enter the United States. They contend that the "screened in" plaintiffs in the present case were members of the class certified in the Florida Action and thus their fifth amendment claims are barred by the doctrine of collateral estoppel. We briefly review some aspects of the Florida Action before addressing this contention.

In the complaint filed November 18, 1991, in the United States District Court for the Southern District of Florida, the Haitian Refugee Center, Inc.

("HRC") alleged that it sought to represent the interests of Haitians who had been intercepted by the United States Coast Guard. HRC sought declaratory relief that the Florida Action defendants' practices of "forcibly returning Haitian refugees to Haiti" violated, *inter alia*, the fifth amendment to the United States Constitution. HRC subsequently filed a second amended complaint, naming as additional plaintiffs fifteen individual Haitians asserted to have been "picked up at sea by the United States Coast Guard." According to the second amended complaint, fourteen of these individual Haitians had been "screened out." The second amended complaint alleged that these fourteen persons were subjected to an "interview [that] was inadequate to allow [them] to meaningfully assert [their] claim for asylum."[3]

The plaintiffs in the Florida Action moved pursuant to Fed. R. Civ. P. 23 to certify as a class:

> all Haitian aliens who are currently detained or who will in the future be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

In a memorandum of law submitted to the district court in support of their request for class action certification, the plaintiffs in the Florida Action asserted that the fifteen new plaintiffs "are all presently members of

[3] It is unclear whether the fifteenth individual was "screened out" but the amended complaint alleged that his asylum interview lasted three minutes and that prior to his interview he was advised "that no matter what he said, he would be returning to Haiti."

the class and in every respect fairly and adequately represent the interests of the class." The memorandum of law noted that the fifteen individual Haitians "have all been 'screened out' and thus are injured by the failure of the INS to observe rules and procedures designed to ensure that no person who is a political refugee will be returned without his consent." The memorandum asserted also that "[a]ll 15 plaintiffs were subjected to the failure of the defendants to comply with INS guidelines for screening asylum claims." The plaintiffs in the Florida Action asserted that the lawsuit fulfilled the requirements for certification as a class action under Fed. R. Civ. P. 23(a) and 23(b)(2).

In an order dated December 3, 1991, the district court in the Florida Action determined without reference to a specific provision of Fed. R. Civ. P. 23, that the second amended complaint could be maintained as a class action. In another order issued that same day, the district court ruled that to the extent that the Florida Action plaintiffs alleged that the interdiction anud repatriation activities of the Florida Action defendants violated the fifth amendment of the Constitution, those claims "must fail."[4] Thereafter the Eleventh Circuit, *inter alia*, vacated the injuctive orders of the district court issued December 20 and December 23 and remanded with instructions to dismiss the complaint, whereupon the plaintiffs in the Florida Action petitioned the United States Supreme Court for a writ of certiorari. The defendants, in the Florida Action, in a brief submitted to the Supreme

[4] This portion of the district court's order was not appealed. *See Baker*, 953 F.2d at 1503-04.

Court in opposition to the Florida Action plaintiffs' petition for a writ of certiorari stated:

> Under current practices, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum under Section 208(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1158 (a). These "screened in" individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a "refugee" and otherwise qualify for the discretionary relief of asylum. Any aliens who are initially "screened in" but ultimately not granted asylum are then to be returned to their country of origin, consistent with procedures afforded under the INA.

The petition for certiorari was denied by the Supreme Court on February 24, 1992. *Baker*, 112 S. Ct. at 1245. Five days later, INS General Counsel Grover Joseph Rees issued a memorandum regarding the processing of "screened in" Haitians on Guantanamo Bay who were excludable for admission to the United States by virtue of having a communicable disease of public health significance.[5] The memorandum directed

[5] Section 1182(a)(1)(A)(i) of 8 U.S.C. provides that aliens who have a communicable disease of public health significance (in accordance with regulations prescribed by the Secretary of Health and Human Services) are excludable. The Attorney General may waive the application of this section to any alien who is the spouse, unmarried son or daughter, or minor lawfully adopted child of a United States citizens, or of a lawfully admitted alien, or to an alien issued an immigrant visa. 8 U.S.C. § 1182(g)(1)(A). The Attorney General may waive the application of § 1182(a)(1)(A)(i) to any alien who has

that the "screened in" Haitians be re-interviewed to determine "whether he or she is a refugee within the definition of INA § 101(a)(42)" and thus might warrant parole into the United States for asylum processing.[6]

On March 18, 1992, the present suit was commenced in the Eastern District of New York. The complaint alleged, *inter alia*, that the first amendment rights of the Haitian Service Organizations—which does not include the Haitian Refugee Center, Inc., which was a party in the Florida Action—were being violated. The complaint also alleged that the New York Action defendants had violated the plaintiffs' right to obtain counsel or to communicate with retained counsel in pursuing their claims for political asylum in contravention of the first and fifth amendments, and that the New York Action defendants had denied the detained Haitians equal protection of the laws "by creating and operating an unauthorized separate and unequal, asylum track for Haitians only." The complaint sought, *inter alia*, an order requiring the defendants "to transport all 'screened in' plaintiffs expeditiously to the United States so that they may be accorded asylum hearings with the full panoply of statutory rights." The complaint also sought a

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a son or daughter who is a United States citizen, or to an alien who has been issued an immigrant visa. 8 U.S.C. § 1182(g)(1)(B).

[6] The appellees assert that this second interview will gather information that will inform the Attorney General's discretionary decision under 8 U.S.C. § 1157(c)(3) on whether to waive the medical exclusion to an otherwise excludable alien for humanitarian concerns. In order to be eligible for waiver of the medical exclusion the alien must be a "refugee." *See* 8 U.S.C. § 1157(a)(3).

declaratory judgment that the New York Action defendants' alleged practices violated, *inter alia*, the first and fifth amendments to the United States Constitution. The New York Action plaintiffs moved for class certification, with respect to the following classes of plaintiffs: "[a]ll Haitian refugees who previously [were] 'screened in' and [were] detained on Guantanamo"; "[a]ll Haitian refugees who [had] retained plaintiff Haitian Service Organizations as counsel, who [might] retain plaintiff organizations as counsel in the future, or who [had] the right to obtain assistance of counsel from other persons"; "[a]ll Haitian refugees who [were] awaiting screening or who [had] been 'screened out' and currently [were] awaiting forcible repatriation, while being detained within territory subject to U.S. jurisdiction; and all lawful permanent residents and citizens living in the United States who were also immediate close relatives of members of any of the above classes who had not been permitted to associate with their relatives because of actions of the New York Action defendants.

In the April 7 order, the district court conditionally certified as a class the "screened in" plaintiffs under Fed. R. Civ. P. 23(b)(2) and rejected the defendants' contention that the doctrine of *res judicata* bound the "screened in" plaintiffs from litigating this suit. The district court observed that in the Florida Action the motion for class certification was granted without a hearing and without amending the class definition and that the subject Haitians received neither notice nor an opportunity to opt-out. The district court noted that according to the Florida Action plaintiffs' description of the class in their memorandum of law in

support of the motion for class certification, the class of Haitian plaintiffs in the Florida Action were "screened out" Haitians. The court found that the "screened in" plaintiffs, the "immediate relative" plaintiffs and the Haitian Service Organizations were new parties and not bound by the outcome of the Florida Action. The court did find, however, that the "screened out" plaintiffs in the New York Action were not a new class and that, consequently, these plaintiffs were bound by the outcome of the Florida Action and that their claims were barred under *res judicata*.

The district court in the New York Action also determined that *res judicata* was inapplicable because the conduct about which the new parties complained had not arisen at the time of the Florida Action. More specifically, the district court concluded that the "INS policy of conducting second interviews to determine whether Haitians carrying the HIV virus have a well founded fear of persecution was developed after the [Florida Action] ended" and that "only recently have the Haitian aliens sought the assistance of counsel." The district court found that the "screened in" plaintiffs' statutory right to counsel, first amendment and fifth amendment due process and equal protection claims were new, that the Haitian Service Organizations' first amendment claim was new and that as a new class all the "immediate relative" plaintiffs' claims were new.

On appeal, the appellants argue that the "screened in" plaintiffs herein were members of the class that was certified in the Florida Action and that their fifth amendment claims are barred by the doctrine of collateral estoppel. We disagree.

"[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation. Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. . . . A judgment in favor of either [the plaintiff class or the defendant] is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) (citations omitted).

For the reasons discussed hereinbelow, we conclude that the class defined in the Florida Action was overly broad, that the issues presented in the present suit were not actually litigated or determined in the Florida Action and thus we decline to apply the doctrine of collateral estoppel to the "screened in" plaintiffs' fifth amendment claims.

It cannot be said that the "screened in" plaintiffs' fifth amendment claims were fairly and adequately represented within the meaning of Fed. R. Civ. P. 23 (a)(4) in the Florida Action. The Florida Action plaintiffs alleged that the Florida Action defendants' practices of forcibly returning interdicted persons to Haiti violated the fifth amendment to the United States Constitution in that the defendants in the Florida Action did not comply with the guidelines promulgated by the INS pursuant to the Executive Order. In moving for class certification, the plaintiffs in the Florida Action presented fourteen "screened out" persons as representative members of the class. However, when the class was certified in the Florida Action, it was the INS' announced policy

to bring "screened in" Haitians to the United States so that they could file an application for asylum. In fact, since the interviews conducted by United States officials already had determined that numbers of Haitians had a "credible" fear of persecution, resulting in their being "screened in," it is not at all likely that the "screened in" Haitians would have alleged that the "interview [they were] afforded . . . was inadequate to allow [them] to meaningfully assert [their] claim for asylum," as the "screened out" Haitians had alleged in the second amended complaint. Despite the broadly defined class and potentially conflicting interests of the members in the purported class in the Florida Action, the class definition was not modified by the district court prior to granting class certification, although "the presence of antagonistic interests within [a Rule 23(b)(2)] class can be handled by redefining the class or creating subclasses under Rule 23(c)(4)." Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*: Civil § 1775 at 457 (2d ed. 1986).

We are aware that Rules 23(b)(2) and 23(d)(2) do not require notice to allow a class member an opportunity to opt-out of a class action suit. *See Penson v. Terminal Transport Co., Inc.*, 634 F.2d 989, 993-94 (5th Cir. Unit B 1981). Nonetheless, in this case we note that

> an over-broad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process. . . . [¶] Some of the difficulty may be sifted out by findings of the trial court at or during the trial that the plaintiffs adequately represents the class. But this issue itself may be determined in the absence

> of 99.9% of those affected, who have had no notice or service of process or right to be heard and who may feel that the plaintiffs in the particular case (or his counsel, or both) is the last person they want representing them.

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126-27 (5th Cir. 1969) (Godbold, J., specially concurring) (footnote omitted). When there is a "strong community of interests" between plaintiffs in a prior suit and plaintiffs in a subsequent suit in that same court

> [t]he proper balance between the public policy of requiring a finality to judgments which settle issues in litigation and that of preventing [violation of the legal right of a subsequent class of plaintiffs who file suit] after such a judgment has been rendered may be achieved by applying the rule of "issue preclusion."

Bronson v. Board of Ed. of the City Sch. Dist. of Cincinnati, 525 F.2d 344, 349 (5th Cir. 1975) (citations omitted), *cert. denied*, 425 U.S. 934 (1976). However, in this case the "community of interests" between the "screened in" plaintiffs in the New York Action and the plaintiffs in the Florida Action is not sufficiently strong to warrant preclusion. The plaintiffs in the Florida Action sought to enjoin the return of interdicted "screened out" Haitians to Haiti, whereas in this suit the plaintiffs in the New York Action apparently seek to enjoin the defendants from repatriating "screened in" Haitians without transporting them "to the United States so that they may be accorded asylum hearings with the full panoply of statutory rights." As previously noted, it is not likely

that the "screened in" Haitians, who had been determined to have a "credible" fear of persecution, would have challenged the interview they were afforded in the same manner that the "screened out" Haitians had in the second amended complaint in the Florida Action. Moreover, the New York Action plaintiffs challenge conduct that was "not in existence at the time of the judgment in [the Florida Action] and could not have been extinguished by it." *Id.* The district court found, and we agree, that the second interview procedures outlined in the February 29, 1992 Rees memorandum constitutes a material change in the INS' policy toward "screened in" Haitians from the INS' previous policy of bringing "screened in" aliens to the United States for asylum proceedings. We conclude that the doctrine of collateral estoppel does not apply to the "screened in" plaintiffs' fifth amendment claims.

Preliminary Injunction

Our standard of review for the issuance of a preliminary injunction is whether such issuance constitutes an abuse of discretion. Applying legal standards incorrectly or relying upon clearly erroneous findings of fact may constitute an abuse of discretion. *Resolution Trust Corp. v. Elman*, 949 F.2d 624, 626 (2d Cir. 1991).

"The standard for issuing a preliminary injunction is well-settled in this Circuit. . . . The party seeking the injunction must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly

toward the party seeking injunctive relief." *Id.*; *see Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).

In the April 7 order, the district court found that the New York Action plaintiffs had demonstrated the threat of irreparable harm should the injunction not be granted and sufficiently serious questions as to the merits of their claims under the first and fifth amendment, and that the balance of the hardships tipped decidedly in their favor. In response to a motion by the New York Action defendants, the district court, on April 8, 1992, noted that it had applied the proper standard in granting the preliminary injunction. Nevertheless, the district court also found that the "likelihood of success on the merits" standard was met as well. On appeal, the appellants argue that the "serious questions" prong of the preliminary injunction standard is not available when the movant seeks to enjoin "actions taken by government officials in the fulfillment of their public duties." Based upon this assertion, the appellants claim that the district court applied the incorrect standard in its April 7 order. We disagree.

The appellants rely primarily upon *Medical Soc'y of the State of New York v. Toia*, 560 F.2d 535 (2d Cir. 1977) and *Union Carbide Agric. Prod. Co., Inc. v. Costle*, 632 F.2d 1014 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981). We believe both *Medical Soc'y* and *Union Carbide* are distinguishable from the present case. In both *Medical Soc'y* and *Union Carbide*, private litigants sought to enjoin a government agency from taking action in the public interest authorized by a specific statute. *See Medical Soc'y*, 560 F.2d at 537 (recipients of Medicaid and physicians

sought to enjoin state agencies from implementation and enforcement of New York Soc. Serv. Law § 365-a (5)(a),(b),(c) and (e) (McKinney Supp. 1976-77); *Union Carbide*, 632 F.2d at 1016 (producers of pesticide chemicals sought to enjoin enforcement of certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136a(c)(1)(D) and 136h(d) (Supp.II 1978)); *see also Plaza Health Lab., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989) (citing *Medical Soc'y* and *Union Carbide* and stating district court should not apply less rigorous standard where "moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme").

The appellants assert that their conduct at issue at Guantánamo Bay "is plainly taken pursuant to Congress' broad grant of authority in the INA." By this argument, the appellants apparently "assume[] that the public interest [rests] solely with it." *See Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980). We believe that in litigation such as is presented herein, no party has an exclusive claim on the public interest. *See Almonte v. Pierce*, 666 F. Supp. 517, 526 (S.D. N.Y. 1987). We thus believe that *Medical Soc'y* and *Union Carbide* are not applicable herein. Further, the "likelihood of success" prong need not always be followed merely because a movant seeks to enjoin government action. *See Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984) (Friendly, J., dissenting); *see also, e.g., Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 836 F.2d 760, 763 (2d Cir. 1988) (per curiam); *Patton v. Dole*, 806 F.2d 24, 28-30 (2d Cir. 1986); *Patchogue Nursing Center v. Bowen*, 797 F.2d 1137, 1141-42 (2d Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987).

1. Irreparable Harm

In the April 7 order, the district court concluded, *inter alia*, that the "screened in" plaintiffs had established by a preponderance of the evidence that irreparable harm would result should the preliminary injunction not be granted. The court found that the "screened in" plaintiffs "may face torture [and] death if they lack access to counsel, fail in their bids to receive asylum, and are repatriated to Haiti."[7] As this conclusion was based upon the district court's findings of fact, and is supported by the record, we do not believe that the district court erred in its findings of irreparable harm. *Cf. Nunez v. Boldin*, 537 F. Supp. 578, 587 (S.D. Tex.) ("Deportation to a country where one's life would be threatened obviously would result in irreparable injury."), *dismissed without opinion*, 692 F.2d 755 (5th Cir. 1982).

2. Serious Questions Going to the Merits

One of the crucial issues presented herein is whether aliens interdicted on the high seas by the United States Coast Guard, who have been found by the government's representatives to have a "credible" fear of persecution on account of "membership in a particular social group[] or political opinion," and are then forcibly detained by United States governmental authorities on property that is under the exclusive control of the United States government, may avail themselves of the due process clause of the fifth

[7] In its opinion and order granting a temporary injunction, the district court stated "[a]ccording to the plaintiffs, aliens are three times more likely to receive asylum in an exclusion or deportation hearing, and twice as likely to success [sic] in an affirmative asylum claim when represented by counsel."

amendment. The unique facts of this case—namely, the interdiction of plaintiffs by United States officials, the status of the territory upon which they are detained, and the "credible" asylum claim they have already been found to possess—lead us to believe that the district court properly issued a preliminary injunction upon finding that there were serious questions going to the merits of the "screened in" plaintiffs' fifth amendment claims.

The district court found that there were serious questions going to the merits of the Haitian Service Organizations' first amendment claim and as part of the preliminary injunction ordered the defendants to permit the Haitian Service Organizations to have immediate access to the "screened in" Haitians on Guantánamo Bay subject to reasonable time, place and manner restrictions. At this point in these proceedings, we need not and do not address the first amendment claim of the Haitian Service Organizations. However, as discussed below, we vacate that portion of the injunction ordering the defendants to allow the Haitian Service Organizations immediate access to the "screened in" Haitians on Guantánamo Bay, although we agree with the remainder of the district court's order.

Judicial review of immigration and naturalization matters is limited. Article I, section 8, clause 4 of the United States Constitution grants Congress the power to "establish a uniform Rule of Naturalization," and the Executive Branch of the federal government has inherent sovereign power to regulate in the immigration field. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). The Supreme Court has stated that " 'the power to expel or exclude aliens [is] a fundamental sovereign

attribute exercised by the Government's political departments largely immune from judicial review.' " *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)) (citations omitted).

Pursuant to its constitutional authorization, Congress has enacted the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1557 (1988). The INA delegates decisions regarding the naturalization of persons to the discretion of authorities in the Executive Branch.

We first look to whether "aliens," which the INA defines as "any person not a citizen or national of the United States," 8 U.S.C. § 1101(a)(3), have any rights under the INA. The Supreme Court has stated that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application," *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), and that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff*, 338 U.S. at 544.

The applicability of the INA is expressly limited to "an alien physically present in the United States or at a land border or port of entry." *See* 8 U.S.C. § 1158(a). The Haitians in this case were interdicted on the high seas and are being held at Guantánamo Bay, Cuba. They are neither physically present in the United States, as defined in the INA, *see* 8 U.S.C. § 1101(a)(38), nor at a port of entry of the United States, see 8 U.S.C. § 1225; 8 C.F.R. §§ 100.4(c), 235.1(a). Therefore, the district court correctly determined that Congress and the Executive Branch have not authorized a procedure under the INA and

the regulations promulgated thereunder that applies to the subject interdicted and "screened in" Haitians detained on Guantánamo Bay.

Notwithstanding the limited scope of judicial review in immigration and naturalization matters, the Supreme Court has indicated that a court may review the procedures employed by the government in an immigration setting to assure that the procedures appropriate under the circumstances comport with constitutional due process, *Landon*, 459 U.S. at 34-35, and the federal judiciary is not precluded from considering whether immigration policies and procedures violate constitutional rights and protections. *Cf. Jean v. Nelson*, 472 U.S. 846, 853-57 (1985).

With the foregoing in mind, we now address the appellees' fifth amendment arguments. The appellees do not contend that the "screened in" plaintiffs have a right to enter the United States. Rather, they claim that the "screened in" plaintiffs have a right, arising under the due process clause of the fifth amendment, not to be deprived of their "liberty" without due process of law. This "liberty" interest, they assert, includes the "freedom not to be sent back to conditions of persecution or death without a fair adjudication that they are not *bona fide* asylees." The appellees claim that such a deprivation of liberty exists independently of any claim to enter the United States.

Noting that the due process clause applies to excludable aliens held at INS detention centers in the United States, the appellees assert that the unique status of the "screened in" plaintiffs warrants even greater due process protections than those afforded excludable aliens in the United States. They argue that, unlike most aliens detained at INS detention

facilities, INS officials already have found that the "screened in" plaintiffs have a "credible" fear of political persecution if returned to Haiti.[8] As further indications of their unique situation, appellees allege that Guantánamo Bay is unlike virtually all other United States military establishments on foreign soil because it is subject to the exclusive jurisdiction and control of the United States, and point out that United States laws apply there. We further note that the district court found that "[n]o detainee in custody is free to go to any country other than Haiti even at their own expense."

The appellees claim that as "de facto asylees" the "screened in" plaintiffs have liberty and property interests in not being returned to Haiti without a fair and adequate adjudication of their asylum applications. They also claim that the detention of the "screened in" plaintiffs, without access to counsel, effectively leaves them exposed to and unable to challenge any illegal attempts to return them to Haiti, notwithstanding United States commitments made in its 1981 agreement with the then-existing government of Haiti.[9]

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[8] At oral argument before this Court, the appellees pointed out that if the asylum proceedings were conducted in the United States (as the government had done during the previous decade of the Haitian interdiction program and promised to do when the Haitians herein were initially detained), the "screened in" plaintiffs could receive the assistance of counsel and would enjoy a statutory right to appeal an adverse ruling on their asylum application.

[9] Appellees further maintain that it cannot be gainsaid that as excludable aliens "screened in" plaintiffs have a funda-

In reply, the appellants claim that extensive United States control over Guantánamo Bay, does not entitle the interdicted Haitians to greater constitutional protections than those afforded aliens who have actually entered the United States. It contends that determinations with respect to refugee status are routinely made at locations abroad, for example, visa applicants at an embassy have no procedural rights regarding their applications.[10] The appellants argue that since the detained Haitians have not "entered" the United States within the meaning of 8 U.S.C. § 1158(a), they are not enttiled to any protections under the due process clause. When inquiry was made at oral argument before this Court, the appellants stated that the "screened in" plaintiffs had no right to attorneys even if they had been subjected to physical abuse on Guantánamo Bay, although appellants speculated that in order to address such conduct the "screened in" plaintiffs possibly had rights and remedies under international law and under local rules and regulations established by the authorities at Guantánamo Bay.

Our review of the unique facts and circumstances of this case leads us to conclude that, in addition to a proper finding of irreparable harm, the district court correctly found that there are serious questions going

mental right to challenge their conditions of confinement. They assert that as detained persons who are "being held incommunicado, without the right to leave Guantanamo, and without recourse if subjected to misconduct or aribtrary action," access to counsel is essential to address any possible violations of the "screened in" plaintiffs' due process rights to assure humane and adequate conditions of confinement.

[10] *See, e.g., Wan Shih Hsieh v. Kiley*, 569 F.2d 1179, 1181 (2d Cir.), *cert. denied*, 439 U.S. 828 (1978).

to the merits of the "screened in" plaintiffs' fifth amendment due process claims and that the balance of the hardships tips decidedly in the "screened in" plaintiffs' favor to warrant the issuance of the injunction, as modified below.

In 1903, the United States and Cuba entered into an "Agreement for the Lease of the United States of Lands in Cuba for Coaling and Naval Stations." Under this lease agreement, the United States was permitted to lease Guantánamo Bay for "coaling or naval stations only, and for no other purpose." The lease agreement provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement *the United States shall exercise complete jurisdiction and control over and within said areas* with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

Agreement for the Lease of the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (emphasis added).[11]

[11] The lease agreement was modified and continued in effect by a 1934 treaty between the countries. Treaty between the

Interestingly, both United States citizens and aliens alike, charged with the commission of crimes on Guantánamo Bay, are prosecuted under United States laws. *See United States v. Lee*, 906 F.2d 117, 117 & n.1 (4th Cir. 1990) (per curiam) (appeal from dismissal of indictment of Jamaican national who had been charged with sexual abuse that allegedly occurred on Guantánamo Bay); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975) (conviction of civilian employee of company doing work on Guantánamo Bay); *see also* 18 U.S.C. § 7 (defining "special maritime and territorial jurisdiction of the United States" for purposes of United States crimes). During the preliminary injunction hearing before the district court herein, a former commander of the Joint Task Force at Guantánamo Bay Naval Base was called by the appellants and testified concerning two incidents with respect to interdicted Haitians detained on Guantánamo Bay that were consistent with the practice of applying United States criminal law on Guantánamo Bay. The former commander testified that an American sailor was prosecuted and court-martialed for raping a female Haitian alien on the base and, further, that the rape of a female Haitian alien on the base by a male Haitian alien was investigated by the United States Attorney's Office in Norfolk, Virginia.[12]

United States of America and Cuba Defining their Relations, May 29, 1934, art. III, T.S. No. 866. The treaty modification did not change the pertinent provisions of the lease agreement.

[12] We note that although the American sailor was court-martialed apparently in accordance with the Uniform Code of Military Justice, 10 U.S.C. §§ 801-935, a federal law to which he voluntarily submitted upon joining the armed forces, there is no indication that the male Haitian similarly voluntarily submitted to be prosecuted under United States law.

As the district court noted, the language of the fifth and fourteenth amendments does not suggest that they apply only to areas fitting a circumscribed definition of the United States. Guantánamo Bay is a military installation that is subject to the *exclusive* control and jurisdiction of the United States. The Supreme Court has recently reaffirmed that fundamental constitutional rights are guaranteed to inhabitants of territory where the United States has sovereign power. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) ("Only 'fundamental' constitutional rights are guaranteed to inhabitants of [unincorporated] territories [not clearly destined for statehood].") In its later discussion of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which involved convicted, enemy aliens in occupied territories outside the United States, the Court stated that it "had rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 [U.S.] [*sic*] at 269. We believe the question remains unanswered and raises serious questions going to the merits of appellees' claim that the fifth amendment applies to non-accused, non-hostile aliens held incommunicado on a military base within the *exclusive* control of the United States, namely Guantánamo Bay. It also raises questions such as whether the treatment of civilians and aliens alike, by the authorities on that military base implies that these persons enjoy due process in terms of civil and criminal laws applied there, and, if so, suggests that the "screened in" plaintiffs also must be accorded due process of law, in-

cluding access to attorneys—who in this case appear ready, willing, and able to counsel and assist the Haitian plaintiffs at no expense to the government for their services. Justice Kennedy observed in his concurrence in *Verdugo-Urquidez*, "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory." *Id.* at 275. (Kennedy, J., concurring). However, the interdicted Haitians are not "some undefined, limitless class of noncitizens who are beyond our territory," they are instead an identifiable group of people who were interdicted by Americans in international waters pursuant to a binding Agreement Between the United States of America and Haiti, and who have been detained on territory that is subject to the exclusive control of the United States. In short, in this case the United States has exercised its "undoubted power . . . to take actions to assert its legitimate power and authority abroad," *id.* at 277, in both interdicting and bringing these Haitians to territory controlled by the United States. It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and detained by such personnel on a land mass exclusively controlled by the United States. *See United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979). We note that, in the present case, applying the fifth amendment would not appear to be either "impracticable" or "anomalous" since the United States has exclusive control over Guantánamo Bay, and given the undisputed applicability of federal criminal laws to incidents that occur there and the

apparent familiarity of the governmental personnel at the base with the guarantees of due process, fundamental fairness and humane treatment that this country purports to afford to all persons. *See Verdugo-Urquidez*, 494 [U.S.] [*sic*] at 278 (Kennedy, J., concurring).

It appears from our brief references discussed above that arrested and accused aliens at Guantánamo Bay, Cuba, are subject to United States criminal laws—and it may be shown upon a fuller record that United States civil laws apply to the conduct of all aliens on the base as well—thus, by implication, the due process clause of the fifth amendment applies to them. We believe there is no principled basis for concluding that the "screened in" plaintiffs detained at the base would have fewer substantive rights than these other aliens.

Courts have determined that the due process clause applies to both the statutory asylum procedure employed by the INS, *see Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984), and the treatment of excludable aliens detained within the United States. *See Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981). Although the INA does not extend to Guantánamo Bay, there is a serious question whether the reach of the Constitution does, and we believe there exist serious questions going to the merits of the appellees' claim that since Guantánamo Bay is under the "complete jurisdiction and control" of the United States, the "screened in" plaintiffs may avail themselves of the protections of the due process clause of the fifth amendment to ensure that United States officials afford them due process.

Finally, we look to the significance of the detained Haitians having been "screened in." An alien is

"screened in" after being found to have a credible fear of returning to his country of origin. According to a November 22, 1991 INS memorandum, a credible fear of returning to the country of origin is defined "as an apprehension or awareness, which appears to be truthful . . . of serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion." The government states in its reply brief that "the decision to screen in a particular migrant is of course an important step in that migrant's effort to obtain entry into the United States . . . ."

The appellees argue that once they are "screened in," i.e., are found to possess a credible fear of returning to their country of origin, the Haitians have a reasonable expectation of not being returned forcibly to a country where they will suffer political persecution without having had a fair adjudication of their asylum applications. Appellees assert that this interest is grounded upon, *inter alia*, the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6,223, T.I.A.S. No. 6,577,[13] the Refugee Act of 1980, the Executive Order and the INS own memoranda.

The United States is a party to the United Nations Protocol Relating to the Status of Refugees, which incorporates Articles 2 to 34 of the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), 19 U.S.T. 6,223, T.I.A.S. No. 2,545, and binds the signatories to the Articles of the 1951

[13] We recognize that the Protocol does not grant rights beyond those afforded under this nation's domestic law, *Bertrand v. Sava*, 684 F.2d 204, 219 (2d Cir. 1982), however, the appellees argument is based upon domestic pronouncements, identified above, as well.

Convention. *See Stevic v. INS*, 467 U.S. 407, 416 (1984). Article 33.1 of the 1951 Convention provides:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

The Refugee Act of 1980 conformed this nation's domestic laws with its treaty obligations under the United Nations Protocol Relating to the Status of Refugees. *Chun v. Sava*, 708 F.2d 869, 870 n.2 (2d Cir. 1983). The Executive Order provides, in part, that "no person who is a refugee will be returned to [the country from which they came] without his consent."

Since the inception of the interdiction program, the INS has contemplated only a single interview of an alien interdicted at sea to determine whether to forward the applicant to the United States for further asylum processing.[14] In the February 29, 1992 Rees

[14] In 1982, the INS procedure provided, in relevant part, "[i]f the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged." In September 1985 the INS policy provided, "[i]f the I&NS Officer finds that the alien has a possible claim to asylum, he will forward the 'question sheet' by cable for advisory opinion from the Department of State, BHRHA. Once the opinion has been given, the I&NS Officer will make the determination to either forward the applicant to the United States, or return him to Haiti." A memorandum dated March 1, 1991 provided, "[a]liens expressing [a] credible fear of returning home should be routed to the United States to formally pursue an asylum claim before an Asylum Officer of the Miami Asylum Office. This standard for trans-

memorandum, the policy of conducting a second interview of "screened in" Haitians detained on Guantánamo Bay was formally announced. According to this memorandum, asylum officers on Guantánamo Bay must find at this second interview that the interviewee has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion, and the second interviews are to "be identical in form and substance, or as nearly so as possible, to those conducted by asylum officers to determine whether asylum should be granted to an applicant already in the United States."

Until recent date, the government's policy has been to interdict boats sailing from Haiti and to transport those interdicted to Guantánamo Bay. Plainly, these appear to have been humanitarian acts consistent with the agreement and Protocol cited above. By these humanitarian actions alone, it does not appear that the legal status of the aliens was altered. However, once interdicted persons have been "screened in" the appellants' conduct would appear to have gone beyond a mere humanitarian function.[15] "Screening

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fer to the United States[] is considerably less than the standard necessary to obtain asylum . . . ." The above-referenced November 22, 1991 INS memorandum did not change that procedure, but attempted to clarify the definition of a "credible fear."

Although these INS memoranda are not regulations and are not entitled to the usual judicial deference, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), they are instructive as to how the INS implemented the Executive Order.

[15] This is not to say that the interdicted Haitians have a right to the assistance of counsel during the initial "screening" interview.

in" a Haitian alien implicates the Agreement Between the United States and Haiti, the Refugee Act of 1980, the Executive Order and the Protocol, to which we are a signatory. These affirmative actions by the Executive Branch and Congress can fairly be said to have established a reasonable expectation by the "screened in" plaintiffs in not being wrongly repatriated; we believe this expectation to be protected by the due process clause. *Cf. United States ex rel. Paktorovics v. Murff*, 260 F.2d 610, 614 (2d Cir. 1958) (Hungarian's acceptance of invitation to migrant [*sic*] to United States, pursuant to announced foreign policy of United States, offered by President in speech, effected a change in Hungarian's status to entitle him to protection of the Constitution). Upon being "screened in," the Haitian aliens' fundamental legal and human rights status is changed vis-à-vis the United States government. Once "screened in"—that is, found by the governmental officials to have a credible fear of persecution if returned to Haiti—the plaintiffs are entitled to due process prior to United States officials altering their now-different status. *See Chun*, 708 F.2d at 877. In *Chun*, this court determined that "a refugee who has a 'well-founded fear of persecution' in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned may well enjoy some due process protection . . . ." Although "screening in" a Haitian alien results in an apparent change in that alien's status, this change, of course, does not determine whether the alien is a "refugee" or is entitled to "enter" into the United States. However, we believe that the altered status of the Haitian alien does mean that the process thereafter employed by the United States with respect to determining the aliens "refugee"

status should accord with some degree of due process protection.

The district court preliminarily found that the "screened in" plaintiffs were "de facto asylees" and that they could avail themselves of the due process clause of the fifth amendment to challenge the restrictions and the related conduct of the United States government officials. We agree, based upon the unique facts and circumstances of this case.

The change in the operation of the interdiction program by the Rees memorandum, which authorizes a "de facto" asylum proceeding at Guantánamo Bay "identical in form and substance" to one conducted in the United States, the continued detention of the Haitians on property that is subject to the exclusive control of the United States, and the INS' own finding that these Haitians possess "credible" fears of persecution if returned to Haiti, taken together, support the conclusion that there are serious questions going to the merits of the appellees' claim that the "screened in" plaintiffs may avail themselves of the due process clause of the fifth amendment. Permitting access to attorneys is a reasonable method to insure that the "screened in" plaintiffs are not wrongly repatriated to a country in which they have already been found by our government to have a credible fear of being persecuted.[16]

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[16] One commentator has noted with respect to the interdiction program with Haiti:

> Interdiction represents a radical departure from normal inspection and inquiry procedures which afford an alien the opportunity to present his or her case, through counsel, to an immigration judge. As to refugees, interdiction runs afoul of the obligations under the domestic withholding provision and its international law correlative—Article 33 of the Protocol relating to the Status of Refugees—to refrain from refoulement. This is the duty not to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> A refugee who would otherwise undergo persecution might be returned upon interdiction without any recourse simply because of an inability to articulate the reasons feared, or to persuade an on-ship inspector that the fear is well-founded, or simply because he or she is afraid to speak to authorities. This is particularly so since there would be no access to counsel under these circumstances.

Arthur C. Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 255 (1984) (footnotes omitted).

Despite these difficulties, herein the "screened in" plaintiffs have articulated reasons that governmental officials have deemed sufficient to establish that the Haitians have a "credible" fear of persecution if returned to Haiti. To now deny access to counsel when the "screened in" plaintiffs will be subjected to an interview "identical in form and substance . . . as one conducted by an asylum officer in the United States" raises questions as to the lawfulness of the government's conduct.

In the INA, Congress has determined that in asylum proceedings, an excludable alien should have the benefit of counsel. In our view, applying due process considerations, the Haitians once "screened in" enter a status akin to being asylees and also should have the advice of counsel.

3. Balance of the Hardships

The application of the "serious questions" portion of the preliminary injunction standard requires this Court to consider whether the district court abused

its discretion in finding that the balance of the hardships tips decidedly in favor of the moving party. "Normally, the purpose of a preliminary injunction is to maintain the *status quo ante* pending a full hearing on the merits. Occasionally, however, the grant of injunctive relief will change the positions of the parties as it existed prior to the grant." *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985) (citations omitted). We conclude that insofar as the district court order *required* the appellants to permit the Haitian Service Organizations to have immediate access to the "screened in" Haitians prior to conducting second interviews or repatriating the Haitians to Haiti, "the controversy [would] have been settled with some finality." *Id.* To avoid that consequence, we vacate that portion of the district court's order.

Confronted with the district court's finding that repatriated Haitians "face political persecution and even death on their return" as compared with the appellants' contention that the "injunction interferes with the ability of the Executive officers to carry out their responsibilities, and therefore threatens to increase the numbers of Haitian migrants fleeing their country in unseaworthy boats,"[17] we have relatively little difficulty in concluding that the district court did not err in finding that the balance of hardships

[17] Appellants assert as well that presentations by counsel are not necessary or helpful and that such presentations may engender delays in the process. Based upon the testimony of two INS officials assigned to Guantánamo Bay, the district court found that "the presence of attorneys during asylum interview on Guntánamo would be useful, feasible, and would not interfere with the interview process." This finding is not clearly erroneous, thus this Court is not entitled to disturb this finding.

tips decidedly in the appellees' favor. *See Mitchell*, 748 F.2d at 808. In balancing the hardships, we are aware that the government's assertion that Guantánamo Bay is an active military base is essentially uncontroverted. We recognize that the courts are not privy to the international, national and internal security concerns that are the proper concern of the Executive Branch and, also, that logistical problems will necessarily arise if attorneys are ordered onto the base. Of importance, the injunction, as modified below, preserves the *status quo* pending further proceedings in the district court, and at the same time the movants avoid being irreparably injured.[18] The injunction is affirmed, as modified, and the district court should immediately take steps to expedite the trial process.[19]

CONCLUSION

In light of the above, to the extent consistent herewith, we affirm the district court's issuance of the preliminary injunction. However, we vacate so much of the preliminary injunction as requires the appel-

[18] The public interest in having United States personnel comply with the Constitution is yet another reason to affirm the district court's order.

[19] To the extent that the likelihood of success on the merits prong applies, we are inclined to agree with the district court's April 8, 1992 finding that the plaintiffs in the New York Action have met this standard as well. As discussed more fully above, the "screened in" plaintiffs have demonstrated that they will likely succeed on the merits of their fifth amendment claims because they were interdicted by the New York Action defendants in international waters, were found to have a credible fear of political persecution if returned to Haiti, and are being detained on land under the exclusive control of the United States.

lants to allow the "screened in" Haitian plaintiffs to have access to attorneys at Guantánamo Bay, but we uphold the order insofar as it enjoins the appellants from processing any further at Guantánamo Bay those Haitians who have already been "screened in" and we uphold the order enjoining the appellants from repatriating any such "screened in" Haitians without, in each instance, providing them access to attorneys through the Haitian Service Organizations or otherwise. The appellants are free, of course, to transport such persons to the United States or to any Congressionally designated port of entry where counsel may be available for the "screened in" Haitian applicants.

Affirmed, as modified.

MAHONEY, *Circuit Judge*, dissenting:

I respectfully dissent.

The majority holds that the interdiction by United States officials in international waters of individuals seeking illegally to enter the United States; the status of a leased United States naval base at Guantánamo Bay, Cuba; and the initial determination by INS officials that Haitians at Guantánamo Bay may possess credible asylum claims combine to endow such Haitians with Fifth Amendment due process protection, or at least to present serious questions in that regard.[1] I disagree, and accordingly would vacate

[1] Because of the majority's determination as to serious questions going to plaintiffs' Fifth Amendment claim, its opinion does not address the First Amendment claim of the Haitian Service Organizations. If I had occasion to address that issue, I would conclude that there is no right to relief on that claim, in accordance with *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498, 1511-15 (11th Cir.) (per curiam), *cert. denied*, 112 S.Ct. 1245 (1992).

the preliminary injunction ordered by the district court in its entirety.

The Supreme Court "has long held that an alien seeking initial admission into the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores."). "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

Furthermore, the determination of procedures concerning the admissibility of aliens is not a power of Congress alone, but is also inherent in the authority of the executive branch to conduct foreign affairs. *Shaughnessy*, 338 U.S. at 543. Congress has vested the Attorney General with almost complete discretion, within numerical limits, to permit immigration of refugees from outside the country's borders. *See* 8 U.S.C. § 157(c) (1988 & Supp. II 1990). Thus, there is generally no right to judicial review for aliens seeking entry to this country. *See Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986) (Congress has power to exclude aliens from entry or prescribe conditions for entry and have

executive branch enforce policy without judicial interference); *Petition of Cahill*, 447 F.2d 1343, 1344 (2d Cir. 1971) (per curiam) (" 'it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.' ") (quoting *Shaughnessy*, 338 U.S. at 543).

Although the majority opinion acknowledges these principles and concedes that the INA does not apply to Haitians at Guantánamo Bay, the majority nonetheless concludes that there are serious questions as to whether the plaintiffs are entitled to the protections of the Fifth Amendment's Due Process Clause. First, the majority opines that the unique nature of Guantánamo Bay—that it is subject to the exclusive control of the United States and that United States criminal laws are applied there—supports the conclusion that these protections might be available to the detained aliens.

The Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the *sovereign territory* of the United States." *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1063 (1990) (emphasis added) (citing *Johnson v. Eisenstrager*, 339 U.S. 763 (1950)). The naval base at Guantánamo Bay is not sovereign territory of the United States. The lease agreement between the United States and Cuba for the naval base expressly states that "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [naval base]." Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418. Accordingly, even though the United States exercises control over the naval base,

the base is not sovereign territory of the United States where the plaintiff aliens are entitled to constitutional protections. Rather, they are accorded such protections only "when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 110 S. Ct. at 1064.

Second, the majority suggests that the application of our criminal laws to the military base means that "by implication, the due process clause of the fifth amendment applies" to the Haitians there. Preliminarily, the fact that United States *citizens* are subject to United States laws does not add any support to the Haitians' claims. *Cf. id.* at 1063 (distinguishing between application of United States laws to citizens and noncitizens abroad). Further, it seems clear that due process protections are available to aliens outside this nation's sovereign territory only in a more limited way that does not impact upon the issues presented for disposition in this case.

Specifically, any party subjected to criminal prosecution under United States laws may well be entitled to constitutional protections *at trial*. *Cf. id.* at 1060 (Fifth Amendment privilege against self-incrimination "is a fundamental trial right of criminal defendants") (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)); *Janvier v. United States*, 793 F.2d 449, 455 (2d Cir. 1986) (sentencing recommendation formerly authorized by 8 U.S.C. § 1251(b) is part of criminal, not deportation, proceeding, so Sixth Amendment right to counsel applies). Thus, if an alien located at Guantánamo Bay were to be prosecuted under United States law, he might well be entitled to some constitutional protections at trial. Any such entitlement, however, is clearly a separate ques-

tion from the issues presented here. *Cf. Verdugo-Urquidez*, 110 S. Ct. at 1060 (distinguishing between trial and nontrial constitutional protections in context of extraterritorial application); *id.* at 1067-68 (Kennedy, J., concurring) (same).

Similarly, I find unpersuasive the majority's view that because "the due process clause applies to both the statutory asylum procedure employed by the INS, *see Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984), and the treatment of excludable aliens detained within the United States," invoking *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987), and *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981), there is a serious question whether the alien plaintiffs have a due process right to consult with counsel at Guantánamo Bay. *Augustin v. Sava* involved an asylum proceeding conducted within the United States. *Lynch v. Cannatella* held that "excludable aliens . . . are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials." 810 F.2d at 1374; *see also Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) ("Other than the protection against gross physical abuse, the alien seeking initial entry appears to have little or no constitutional due process protection."). *Rodriguez-Fernandez v. Wilkinson* ruled that "an excluded alien in physical custody within the United States may not be 'punished' [in that case, imprisoned indefinitely] without being accorded the substantive and procedural due process guarantees of the Fitfh Amendment." 654 F.2d at 1387. I see little assistance in any of these cases for

the resolution of the due process issues presented on this appeal.[2]

Finally, it is the majority's view that once Haitians at Guantánamo Bay have been "screened in," i.e., found to possess a credible fear of returning to Haiti, they should be deemed "de factor asylees" who "have established a reasonable expectation . . . in not being wrongly repatriated . . . [that is] protected by the due process clause." It is clear, however, that the "screening in" of a Haitian alien does not determine whether the alien is a "refugee" or is entitled to admission to the United States, and that the determination of refugee or asylee status rests solely with the appropriate INS officials, and not with this court.

In this case, the initial screening interview is simply one step in the process for an alien interdicted at sea to gain admission into this country. Congress has explicitly authorized the executive to exclude an alien seeking admission who is determined to have a communicable disease. 8 U.S.C. § 1182(a)(1)(A)(i) (Supp. II 1990). It accordingly seems curious that a second screening interview of an individual located outside this country, designed to gather information that might aid the Attorney General in reaching a determination whether to exercise his discretion and waive the exclusion, *see* 8 U.S.C. § 1157(a)(3) (1988), would run afoul of the Constitution. Nor is a serious constitutional question presented, as I see it, be-

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[2] I note in this connection the district court's finding that "[n]o detainee in custody is free to go to any country other than Haiti even at their [sic] own expense." The government has represented that the detainees are free to go to any country that will accept them, but that acceptances have not been forthcoming. I am unaware of any reason to disbelieve that representation.

cause the INS initially conducted a single-interview process with respect to the "screening in" of the Haitians at Guantánamo Bay, but subsequently determined to conduct a second interview of those determined to have a communicable disease.

For all the foregoing reasons, plaintiffs-appellees have not established, in my view, either a likelihood of success on the merits or the existence of serious questions going to the merits with respect to their Fifth Amendment due process claims. I would accordingly vacate the preliminary injunction in its entirety.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 CV 1258

HAITIAN CENTERS COUNCIL, INC., ET. AL., PLAINTIFF,

- against -

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET. AL., DEFENDANT.

MEMORANDUM AND ORDER

[Filed Mar. 27, 1992]

Johnson, District Judge:

This cause of action arises on the application of the following (hereinafter "the Plaintiffs"): Haitian Centers Council, Inc., National Coalition for Haitian Refugees, Inc., Immigration Law Clinic of the Jerome N. Frank Legal Services Organization, (the "Haitian Service Organizations"), Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, and Roges Noel on behalf of themselves and all others similarly situated (the "Screened In Plaintiffs")[1]; A. Iris Vilnor

[1] Throughout this opinion, reference will be made to so-called "screened in" and "screened out" Haitian aliens. For purposes of this opinion, "screened in" individuals include

on behalf of herself and all others similarly situated (the "Screened Out Plaintiffs"); and Mireille Berger, Yrose Pierre and Mathieu Noel on behalf of themselves and all other similarly situated (the "Immediate Relative Plaintiffs") for a Temporary Restraining Order pursuant to F.R.C.P. 65. The defendants in this action are Gene McNary, Commissioner, Immigration and Naturalization Service; William P. Barr, Attorney General; Immigration and Naturalization Service; James Baker, III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay (collectively, the "Defendants" or the "Government"). Plaintiffs seek to restrain the Defendants from:

1) denying plaintiff Haitian Service Organizations access to their clients for the purpose of providing such clients legal counsel, advocacy, and representation;

2) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian citizen currently being detained on Guantanamo, on Coast Guard cutters, or in territory subject to United States jurisdiction who is being denied or has been denied his or her right to communicate with counsel; and

3) returning to Haiti any Haitian citizen currently detained at Guantanamo, on the Coast Guard cutters, or in territory subject to U.S. jurisdiction, who has

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Haitian aliens who satisfy the threshold standard for refugee status and are to be brought to the United States so that they may file an application for asylum under the Immigration and Nationality Act ("INA") and "screened out" individuals include Haitian aliens who do not meet the threshold standard for refugee status and who will be repatriated to Haiti.

been "screened-out" without the benefit or advice of counsel.

BACKGROUND

In December 1990, the country of Haiti held its first fully democratic elections in over 200 years and elected Jean Bertrand Aristide as President. On September 30, 1991, President Aristide was overthrown in a military coup and thousands of Haitians attempted to escape the country's upheaval by fleeing onto the high seas in boats. The United States Coast Guard began interdicting an increasing number of vessels carrying Haitian refugees on the open seas.[2] The United States temporarily suspended it program of repatriation of interdicted Haitians. On November 18, 1991, the United States announced it had begun the forced return of refugees who were "screened out" by the Immigration and Naturalization Service ("INS") had determined not to be entitled to political asylum.[3]

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[2] On September 23, 1981, Haiti and the United States entered into a cooperative agreement (the "Agreement") to prevent the illegal migation of aliens without visas from entering the United States. Interdiction Agreement, Sept. 23, 1981, United States-Haiti, T.I.A.S. No. 10241. Under the Agreement, the United States may board Haitian flag vessels on the high seas for the purpose of making inquiries relating to the condition and destination of the vessels and the status on board. If a violation of United States or Haitian law is ascertained, the vessel and its passengers may be returned to Haiti. The Agreement also explicitly provides that it is "understood that . . . the United States does not intend to return to Haiti, any Haitian migrants whom the United States authorities determine to qualify for refugee status."

[3] According to the Defendants, as of March 19, 1992, the disposition of the interdiction and repatriation program is as follows:

a. *The Baker Litigation*

The following day, the Haitian Refugee Center (hereinafter "HRC") and individual Haitian refugees (hereinafter "Named Haitian Plaintiffs") on behalf of themselves and all others similarly situated filed a complaint (*Haitian Refugee Center* v. *Baker*, Dkt. No. CV-91-2635, S.D. Fla.) (hereinafter "*Baker*") for Declaratory Judgment and Injunctive Relief, and an Application for Temporary Restraining Order (the "First TRO") in the United States District Court for the Southern District of Florida. The defendants named therein were James Baker, III, Secretary of State; Rear Admiral Robert Kramer and Admiral Kime, Commandants, United States Coast Guard; Gene McNary, Commissioner, Immigration and Naturalization Service; The United States Department of Justice; Immigration and Naturalization Service; and The United States of America.

Following a *ex parte* hearing on November 19, 1991, the Florida district court issued the First TRO which directed the defendants to restrain "from continuing to repatriate Haitians currently on board U.S.-flagged vessels and Haitians currently being held on land under United States' control and at Guantanamo Bay, Cuba." On December 3, 1991, the district court issued an order granting preliminary

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—16,464 Haitians have been interdicted

—9,542 Haitians have been repatriated to Port-au-Prince

—3,446 Haitians are ashore at Guantanamo Bay Naval Base

—2,822 Haitians have been brought to the United States to pursue asylum claims

—233 Haitians have been transported to third countries

—0 Haitians are aboard Coast Guard cutters.

injunctive relief specifically enjoining the defendants from "forcefully repatriating the individual plaintiffs or class members in their custody either until the merits of the underlying action are resolved or until defendants implement and follow procedural safeguards adequate to ensure that Haitians with bona fide claims of political persecution are not forcefully returned to Haiti." [4]

The court found that the plaintiffs were likely to succeed on the merits of two judicially enforceable claims: 1) HRC's First Amendment rights of association and to counsel; and 2) the Named Haitian Plaintiffs' right of non-refoulement [5] which arises under Article 33 of the 1967 United Nations Protocol Relating to the Status of Refugees. The court also issued an order stating the action could be maintained as a class action without holding a hearing or altering the class definition. In their Memorandum in Support of Motion for Class Action Certification ("HRC Mem."), the *Baker* plaintiffs defined the class as follows:

> The individual plaintiffs are all Haitian emigres who were intercepted by the United States Coast Guard pursuant to a "program of interdiction"

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[4] *Haitian Refugee Center v. Baker*, No. 91 CV 2635 *Order Granting preliminary Injunctive Relief and Supporting Memorandum Opinion* (S.D.Fla. December 3, 1991).

[5] Article 33.1 of the Convention provides:

> no contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

T.I.A.S. No. 6577 (1968).

> that permits interception and repatriation of undocumented aliens. They are presently being held on Coast Guard cutters and at the U.S. Naval base in Guantanamo. They have all been '*screened out*' and thus are injured by the failure of the INS to observe rules and procedures designed to ensure that no person who is a political refugee will be returned without his consent. *Id.* at 2 (emphasis added).

In other words, the class of plaintiffs involved in they [*sic*] *Baker* litigation were limited to individuals who had already been screened out by INS.

The Eleventh Circuit dissolved this injunction on December 17, 1991 ("*Baker App. I*") and remanded the case with instructions that the Article 33 claim be dismissed on the merits. In *Baker App. I*, the Court of Appeals found that 1) the injunction was overbroad; 2) the relief granted did not address the right of access asserted by the Haitian Refugee Center; and 3) Article 33 of the 1976 United Nations Protocol Relating to Status of Refugees is not self-executing, and thus provides no enforceable rights to Haitians who had not reached United States territory. *Haitian Refugee Center* v. *Baker*, 949 F.2d 1109 (11th Cir. 1991).

The district court subsequently issued another TRO (the "Second TRO") on the plaintiffs' claim that defendants failed to follow the procedural requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 555(b), 557, 558 and 702. On December 19, 1991, the Eleventh Circuit deemed the Second TRO a preliminary injunction and stayed it pending appeal on the ground that it was likely that the government would prevail on the merits of the APA claim ("*Baker App. II*").[6]

The following day, the district court entered a preliminary injunction ordering defendants to grant plaintiffs' lawyers access to the interdicted class members. On December 23, 1991, the court entered a second preliminary injunction on the ground that the plaintiffs were likely to succeed on the merits of their APA claim and simultaneously stayed its enforcement pursuant to the Eleventh Circuit's decision in *Baker App. II*.

The Eleventh Circuit Court of Appeals issued a (2-1) *per curiam* opinion on February 4, 1992 ("*Baker App. III*") reversing the District Court's injunction on First Amendment and APA grounds, vacating all District Court orders, and remanding the case with instructions to dismiss because the complaint failed to state a claim upon which relief could be granted.[7] The plaintiffs filed a petition for a writ of certiorari and an accompanying application for a stay of the Eleventh Circuit's mandate in *Baker App. III*. On February 24, 1992, the Supreme Court denied certiorari and petitioners' application for a stay of

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[6] *Haitian Refugee Center* v. *Baker*, 950 F.2d 685 (11th Cir. 1991) ("*Baker App. II*").

[7] The Court of Appeals ruled that aliens who had been interdicted on the high seas and had not presented themselves at United States' borders had no right to judicial review under the Administrative Procedure Act; 2) the executive order providing for interdiction of aliens did not create a private right of action in favor of aliens improperly returned; and 3) Haitian Refugee Center had no First Amendment right to access to aliens lawfully interdicted and detained. *Haitian Refugee Center* v. *Baker*, 953 F.2d 1498 (11th Cir. 1992) ("*Baker App. III*").

the *Baker App. III* mandate. *Haitian Refugee Center v. Baker*, 60 U.S.L.W. 2513 (1992).

Five days after the Supreme Court denied plaintiffs' petition for certiorari in *Baker App. III*, the General Counsel of the INS, Grover Joseph Rees, circulated a memorandum setting forth policy to interview "any person 'screened in' as a possible refugee who has been determined to have a communicable disease that is not curable . . . to determine whether he or she is a refugee." On March 2, 1992, six Screened In Plaintiffs contacted one of the Haitian Service Organizations seeking legal assistance. Nine days later, counsel to the Haitian Service Organizations wrote to the Commissioner of the INS and the Commander of the Guantanamo Naval Base, requesting immediate access to their clients on Guantanamo Bay and Coast Guard cutters off Guantanamo.[8] On or about March 10, 1992, approximately 20 asylum officers arrived at Guantanamo to decide the asylum claims of some of the "screened in" Haitians who have been denied access to counsel and who are now members of the plaintiff class in the instant action.

b. *The Present Action*

On March 17, 1992, the plaintiffs filed an order to show cause with supporting affirmations as an "emergency matter" on this court's Miscellaneous docket which was subsequently referred to the Civil docket and assigned, by random selection, to this court. That same afternoon, this court heard oral argument from both plaintiffs' and defendants' counsel on plaintiffs' application for a temporary re-

[8] According to the plaintiffs, the Haitian Service Organizations have yet to receive a response. See discussion *infra*.

straining order (the "TRO") and their demand for expedited discovery. The following morning, this court heard more oral argument and the plaintiffs filed a complaint seeking declaratory and injunctive relief. During oral argument, the defendants asserted that plaintiffs were wholly precluded from bringing this suit by the prior litigation in *Baker*.

This court took the matter under advisement and requested that the parties brief certain issues related to the TRO. The Defendants filed their Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order, a Motion to Dismiss pursuant to F.R.C.P. 12(b)(6) for failure to state a claim, and a Motion for Rule 11 Sanctions on March 20, 1992.[9] Plaintiffs filed reply papers on March 23, 1992. After reviewing the papers, the court finds that the plaintiffs' papers raise sufficient questions of law and fact to conclude that the *Baker* litigation does not entirely preclude the present action. As set forth below, the court finds that some of the plaintiffs meet the standards for the immediate issuance of a TRO.

DISCUSSION

a. *Res Judicata*

I. New Parties

The doctrine of res judicata bars relitigation of any claim between two parties where a court has previously entered a final judgment on the merits. *Allen v. McCurry*, 449 U.S. 90 (1980); *Milltex In-*

[9] For the purposes of this TRO, the court will not address Defendants' Motion to Dismiss and Motion for Rule 11 Sanctions as they are premature. In the event that Plaintiffs prevail in the preliminary injunction hearing, the court will then address the merits of these motions by the Defendants.

dustries Corp. v. *Jacquard Lace Co. Ltd.*, 922 F.2d 164 (2d Cir. 1991). Where the subsequent litigation involves new parties and new claims, the action is not barred by *res judicata*. Nonetheless, the doctrine of collateral estoppel precludes litigation of any issue of law or fact that was necessary to the court's judgment in a prior action involving the same party. *Allen* v. *McCurry*, 449 U.S. at 94.

Based on my understanding of the complaint, plaintiff A. Iris Vilnor, who sues on behalf of herself and all others similarly situated, is seeking relief for herself and other Haitians who were "screened out" prior to the *Baker* litigation and who are bound by its outcome. As the complaint's description of this class fails to state whether these individuals were ever screened in, it appears that these class members are not new parties.[10] Thus *Baker* precludes their claims herein.

Of the remaining plaintiffs in the present action, all of the Haitian Service Organizations are new and two of the three plaintiff classes are new parties. The immediate relatives of "screened in" Haitians and all those similarly situated make up an entirely new plaintiff class which was not a party to the *Baker* litigation. In addition, the Haitian plaintiffs in the present action consist of a *new* "screened in" class of refugees who were not included in the *Baker* class. Finally, the Haitian Service Organizations in this

[10] If Plaintiffs are able to establish at the preliminary injunction hearing that this class includes Haitians who were "screened in" prior to and during the *Baker* litigation and therefore were not parties to *Baker*, and since that time have been "screened out," then this court will reconsider its initial conclusion that *Baker* bars them from litigating their claims in this action.

action differ from the plaintiff organization (Haitian Refugee Center) in *Baker*.[11] Therefore, it appears that *res judicata* is inapplicable to the Haitian Service Organizations, the Screened In Plaintiffs and the Immediate Relative Plaintiffs.

II. Subsequent and Changed Conduct

Res judicata is also inapplicable where neither conduct complained of nor the claim had not arisen at the time of the first suit. *Prime Management Co., Inc.* v. *Steinegger*, 904 F.2d 811 (2d Cir. 1990); *N.L.R.B. v. United Technologies Corp.*, 706 F.2d 1254 (2d Cir. 1983); *see generally* Wright, Miller & Cooper, 18 *Federal Practice and Procedure* § 4409 (West 1981). That certainly appears to be true in present action. Plaintiffs' complaint is based upon new circumstances or conduct that occurred after the *baker* [*sic*] litigation and it is such conduct that gives rise to a new cause of action. Specifically, the present complaint alleges that during the *Baker* litigation the defendants represented:

> Under current practice, any aliens who satisfy the threshold standard *are to be brought to the United States so that they can file an application for asylum* under Section 208.02 of the Immigration and Nationality Act (INA), 80 SL sec. IJ8(a). These 'screened in' individuals then have

[11] The government argues that privity should bar the Haitian Service Organizations from bringing this action. On the face of the complaint, this court fails to see any privity relationship or anything which conclusively establishes the existence of privity. If the Government is able to raise an issue of fact as to privity at the hearing on the preliminary injunction, this court will resolve this issue at that time.

> the opportunity for a *full adjudicatory determination* of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum. Complaint ¶ 34(f) (*citing* Opposition to Certiorari, *Baker App. III*, at 3.).

Five days after the Supreme Court denied certiorari, the INS began implementing procedures to interview or screen individuals who had been "screened in."

Plaintiffs allege that the Screened In Plaintiffs contacted the Haitian Service Organizations seeking legal assistance on March 2, 1992. Plaintiffs learned on March 10th that asylum officers arrived in Guantanamo to begin adjudicating asylum claims of the [*sic*] some of the "screened in." The next day, counsel to the Haitian Service Organizations wrote to defendant McNary and the Commanding Officer of the U.S. Naval Air Station, Guantanamo Bay, requesting access to the Screened In Plaintiffs and the Screened Out Plaintiffs by March 16, 1992. To date, Plaintiffs' counsel has received no response.

Plaintiffs allege that the Government is re-screening and adjudicating asylum claims not only for HIV positive refugees as the government contends but many if not all the "screened in" Haitians on Guantanamo. These re-screenings and adjudications are allegedly being conducted without providing the refugees the opportunity to obtain and communicate with counsel. Presuming the complaint true for present purposes—apecifically [*sic*], that the Government's conduct began subsequent to the *Baker* litigation—it appears that this conduct gives rise to new claims, making *res judicata* inapplicable.

b. *Issuance of a Temporary Restraining Order*

A court may issue an [*sic*] temporary restraining order upon a showing or irreparable harm and for the purpose of preserving the status quo long enough to hold a hearing. *Warner Bros. Inc.* v. *Dae Rin Trading Inc.*, 877 F.2d 1120 (2d Cir. 1989), *citing Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters*, 415 U.S. 423 (1974).

Here, the plaintiffs have made a showing of irreparable harm by a preponderance of the evidence. According to the plaintiffs, aliens are three times more likely to receive asylum in an exclusion or deportation hearing, and twice as likely to success in an affirmative asylum claim when represented by counsel. If the Screened In Plaintiffs on Guantanamo are not afforded asylum, are "screened out" and are ultimately repatriated to Haiti, they face irreparable injury to life and liberty.

Since the military overthrow of President Jean Bertrand Aristide on September 30, 1991, reportedly over fifteen hundred Haitians, many of them supporters of Aristide, have been killed, tortured, or subjected to violence and the destruction of their property because of their political beliefs. Hundreds of people have been detained without warrant or executed extrajudicially. Thousands of people have been forced into hiding.

There are reports that Haitians who have been repatriated since November 1991 are interviewed, fingerprinted and photographed upon their arrival in Port-au-Prince. Apparently, over 200 Haitians who were repatriated from Guantanamo have been imprisoned. The are approximately forty repatriated Haitians who have fled for a second time (also known as "Double-Backers") and are currently being de-

tained on Guantanamo. The Double-Bakers lend further credence to reports of the widespread violence that is occurring. *See, Some Haitians Assert Abuse Forced Second Flight*, N. Y. Times, Feb. 10, 1992 at A1.[12]

Given that at a preliminary injunction hearing the Plaintiffs are likely to prove their assertions that there are new parties and/or new claims in the instant action, the merits of this action will need to be addressed. Serious questions going to such merits are raised by the papers and oral argument so far

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[12] Although the court believes that the only factor that must be satisfied for a TRO is irresparable harm, *see* F.R.Civ.P. 65(b), the court notes that one district court has applied a more stringent standard when a TRO is issued on notice: 1) a showing of irreparable harm and 2) sufficiently serious questions going to the merits making them fair ground for litigation and balance of hardship tipping in favor of the moving party. *See Binghamton City School District* v. *Borgna*, No. 90 CV 1360, 1991 WL 29985 at *4 (N.D.N.Y. March 6, 1991). This court finds no Second Circuit or Supreme Court precedent for the application of this higher standard to this TRO issued on notice.

Were this court obligated to inquire into the second factor, however, it finds that the second prong of such standard has been satisfied. Specifically, although this TRO may increase the government's financial burden, when this cost is balance [*sic*] against the irreparable harm to life and liberty the plaintiffs may face if they lose their bid for asylum and are repartriated, the court concludes that the balance of hardships tip in favor of the plaintiffs. Finally, as to any potential "magnet effect," I find that, at this time, the relief afforded herein is so temporary in nature and narrowly drawn that it should not encourage more Haitians to take to the high seas. In addition, as is discussed more fully in the text above, the court also finds that there are serious questions going to the merits to make them fair ground for litigation.

presented to this court. In particular, I am quite disturbed that the Government asserts that the court lacks the power to restrain conduct by United States officials that is arbitrary, capricious and perhaps even cruel. (*See* Hearing Transcript at p.39) when such conduct occurs on territory that is subject to United States jurisdiction.[13] Worse yet, the Government asserts that this court must sit mute when Congress mandated:

> In any exclusion or deportation proceedings before a special inquiry officer . . ., the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C.A. § 1362. Additionally, INS's regulations specifically provides that an alien "shall be advised of his right to representation by counsel of his choice at no expense to the Government." 8 C.F.R. § 242.1(c) (1990). In light of the foregoing, serious issues are raised which warrant the issuance of the TRO herein granted and, moreover, a fuller exploration of the merits of this action at a preliminary injunction hearing.

c. *Security*

Defendants demands [*sic*] that plaintiffs to post a $10,0000,000 [*sic*] bond as security. In light of the Government's failure to substantiate its demand for a $10 million bond, the plaintiffs' indigence, and the

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[13] Guantanamo Bay, Cuba is subject to United States jurisdiction. *See* Treaty Between the United States of America and Cuba, Feb. 16, 1903.

important question raised in this case, the court will exercise its discretion and waive the bond. *See United States v. Bedford Associates*, 618 F.2d 904, 916-17 n.23 (2d Cir. 1980).

CONCLUSION

For the foregoing reasons, it is hereby:

ORDERED, that sufficient reason having been shown therefore, pending the hearing for the plaintiffs' application for a preliminary injunction, pursuant to Federal Rule 65, defendants are temporarily restrained and enjoined from:

a) denying plaintiff service organizations access to their clients for the purpose of providing them legal counsel, advocacy, and representation;

b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian citizen currently being detained on Guantanamo, or in any other territory subject to U.S. jurisdiction (I) who has been screened in or who was screened in prior to the *Baker* litigation and has since been screened out and (ii) who is being denied or has been denied his or her right to communicate with counsel; and it is further

ORDERED that expedited discovery be granted, thereby in accordance with the following scheduling order:

(i) defendants' must produce documents for inspection and copying on or before March 31, 1992; and

(ii) plaintiffs are granted leave to serve and depose Defendants o [*sic*] or before April 1, 1992 at 9:00 a.m.; and it is further

ORDERED, that the defendants or their attorneys show cause before The Honorable Sterling Johnson, Jr., United States District Judge, at the United States Courthouse in the Eastern District of New York, 225 Cadman Plaza, Brooklyn, New York, in Courtroom 14 at 9:00 a.m. on April 1, 1992, why an order should not be entered granting Plaintiffs' request for Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65 thereby in accordance with the terms of the TRO issued herein or as otherwise may be deemed just and proper.

So ordered.

/s/ Sterling Johnson, Jr.
United States District Judge

Dated: Brooklyn, New York
March 27, 1992

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 CV 1258

HAITIAN CENTERS COUNCIL, INC., NATIONAL COALITION FOR HAITIAN REFUGEES, INC., IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION, OF NEW HAVEN CONNECTICUT; DR. FRANTZ GUERRIER, PASCAL HENRY, LAURITON GUNEAU, MEDILIEU SOREL ST. FLEUR, DIEU RENEL, MILOT BAPTISTE, JEAN DOE, AND ROGES NOEL ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED; A. IRIS VILNOR ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED; MIREILLE BERGER, YVROSE PIERRE AND MATHIEU NOEL ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

- against -

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, WILLIAM P. BARR, ATTORNEY GENERAL; IMMIGRATION AND NATURALIZATION SERVICE; JAMES BAKER, III, SECRETARY OF STATE; REAR ADMIRAL ROBERT KRAMEK AND ADMIRAL KIME, COMMANDANTS, UNITED STATES COAST GUARD; AND COMMANDER, U.S. NAVAL BASE, GUANTANAMO BAY, DEFENDANT.

[Filed Apr. 6, 1992]

MEMORANDUM AND ORDER

Johnson, District Judge:

I. *FINDINGS OF FACT*

1. The defendants in this action are Gene McNary, Commissioner, Immigration and Naturalization Service; William P. Barr, Attorney General; Immigration and Naturalization Service; James Baker, III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay (the "Government").

2. The plaintiffs are the Haitian Centers Council, Inc., the National Coalition for Haitian Refugees, Inc., the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization ("Haitian Service Organizations"); Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, and Roges Noel on behalf of themselves and all others similarly situated ("Screened In Plaintiffs"); A. Iris Vilnor on behalf of herself and all others similarly situated ("Screened Out Plaintiffs"); and Mireille Berger, Yrose Pierre and Mathieu Noel on behalf of themselves and all others similarly situated ("Immediate Relative Plaintiffs").

3. The Haitian Service Organizations were neither parties to the *Haitian Refugee Center* v. *Baker* ("*Baker*") litigation nor privies of the Haitian Refugee Center.[1] The Immediate Relative Plaintiffs were not parties to the *Baker* litigation.

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[1] For a detailed discussion of the *Baker* litigation, *see Haitian Centers Council, Inc.* v. *McNary, et al.*, No. 92-1258, Memorandum and Order dated March 27, 1992.

4. On September 29, 1981, President Ronald Reagan ordered the Secretary of State "to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea." Executive Order No. 12324, 46 F.R. 48109 (1981) *reprinted in* 8 U.S.C.A. § 1182 note (1982) ("Executive Order").

5. Under the cooperative agreement (the "Agreement") entered into by the United States and Haiti, the United States may board Haitian flagged vessels on the high seas for the purpose of making inquiries relating to the condition and destination of the vessel and the status of those on board. Interdiction Agreement, Sept. 23, 1981, United States-Haiti, T.I.A.S. No. 10241. If a violation of United States or Haitian law is ascertained, the vessel and its passengers may be returned to Haiti. The Agreement also explicitly provides that it is "understood that . . . the United States does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."

6. On September 30, 1991, President Jean Bertrand Aristide was overthrown in a military coup. In the wake of the overthrow, hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding. Plaintiffs' Exhibit ("Pl. Ex.") 30.

7. To escape the country's political upheaval, thousands of Haitians began to flee onto the high seas. The United States Coast Guard began interdicting an increasing number of vessels carrying Haitian aliens.

8. As of March 19, 1992, the United States Coast Guard has interdicted 16,464 Haitians and has repatriated 9,542 Haitians to Port-au-Prince.

9. The United States Naval Base at Guantanamo Bay, Cuba is subject to a lease agreement between the United States and Cuba which states that:

> during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations. February 16, 1903.

10. The U.S. Naval Base at Guantanamo is a "relatively open base" to which non-military personnel such as military dependents, foreign nationals, contractor employees providing support services, civilian government employees are allowed access. ("Pl. Ex.") 38 at 89-91. The facilities include schools, bars, restaurants, a McDonalds, and a Baskin-Robbins.

11. The United States Coast Guard take [*sic*] Haitian aliens who are interdicted on the high seas into custody and transport [*sic*] them to Guantanamo where they are held incommunicado. Approximately 3,300 Haitian aliens are currently in the custody of the United States at Guantanamo. The Haitians live in camps surrounded by razor barbed wire fences. Haitian detainees who are accused of committing an "infraction" are placed into a separate camp known as "Camp 7." No detainee in custody is free to go to any country other than Haiti even at their own expense. (Preliminary Injunction Hearing Transcript, "P.I." Transcript, at 165. Nor are they permitted to make telephone calls. Although, the military has pro-

vided the Haitian aliens with various services including schools, medical care and religious services, it has denied them access to legal services.

12. Under the interdiction program, INS asylum officers at some point interview interdicted Haitians to determine whether they have a "credible" fear of political persecution if returned to Haiti. Those found to have a "credible" fear are screened in. Those found not to have a "credible" fear are screened out. Haitians who are screened in are to be brought to the United States so that they may pursue asylum claims. To date approximately 2,800 Haitians have been brought to the United States. Haitians who are screened out are repatriated to Haiti.

13. During the *Baker* litigation, the United States government represented that:

> Under current practice, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum under Section 208.02 of the Immigration and Nationality Act (INA), 80 SL sec.ILJ8(a). These 'screened in' individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum.

Compliant ¶ 34(f).

14. Five days after the Supreme Court denied certiorari in *Haitian Refugee Center* v. *Baker*, 60 U.S.L.W. 2513 (1992) the Government changed this practice. On February 29, 1992, the General Counsel of the INS, Grover Joseph Rees, circulated a memorandum setting forth policy to conduct second interviews of all screened in Haitians who have been found to have a communicable disease.

15. The Government requires that all Haitian aliens who have been screened in by INS asylum officers to undergo medical testing to determine whether they carry the HIV virus.

16. Approximately 200-400 Haitian aliens are suspected of carrying the HIV virus. Screened in Haitians who test positive for the HIV virus must undergo a second INS interview to determine whether they have a "well-founded" fear of political persecution if returned to Haiti. Approximately 200-400 Haitian aliens are suspected of carrying the HIV virus.

17. According to INS policy, the second interviews are intended to be "identical in form and substance, or as nearly so [*sic*] possible, to those conducted by asylum officers to determines [*sic*] whether asylum should be granted to an applicant already in the United States." Pl. Ex. 1.

18. The INS has directed asylum officers to use the usual standards and techniques for asylum interviews as set forth in the INS procedures and operations manuals.

19. The "well-founded fear standard used by INS asylum officers when conducting second interviews of screened in Haitians is identical to that required to grant asylum or refugee status to an individual physically present in the mainland United States.

20. While asylum applicants in the United States may have attorneys present during their asylum interviews, asylum applicants being held in custody on Guantanamo are not permitted to have access to an attorney during their second INS interview.

21. When INS began conducting second asylum interviews, the Haitian aliens including the Screened In Plaintiffs began seeking the assistance of counsel. P.I. Transcript at 159, 164-5.

22. By INS officials' own admission, the presence of attorneys during asylum interviews on Guantanamo would be useful, feasible, and would not interfere with the interview process. (Pl. Ex. 68 at 129-30; Pl. ex. 69, at 124-131).

23. INS asylum officers have conducted sixty-four second asylum interviews. Thirty-four Haitians who had established a credible fear of persecution, tested positive for the HIV virus and failed to establish a well founded fear of persecution if returned to Haiti during a second INS interview would have been repatriated absent the temporary restraining order ("TRO") issued by this court on March 27, 1992.

24. Repatriated Haitians face political persecution and even death on their return. Approximately forty repatriated Haitians (also known as "Double Backers") have fled Haiti for a second time and have been screened in by the INS.

25. The Government has managed to accommodate the requests of congressmen, clergymen, church groups, and members of the press seeking access to the Haitians being held in custody on Guantanamo.

26. The Government has denied attorneys, the Haitian Service Organizations, and the Immediate Relative Plaintiffs access to the Haitians detained at Guantanamo apart from the access ordered by the TRO issued by this court and the Florida district court in *Baker*.

27. INS officials on Guantanamo lost approximately 1,080 records of Haitian aliens who consequently had to be rescreened.

28. The evidence presented by the Government is inconclusive as to any "magnet effect" resulting from the issuance of this court's TRO.

II. *CONCLUSIONS OF LAW*

A. RES JUDICATA

1. The doctrine of res judicata bars relitigation of any claim between two parties where a court has previously entered a final judgment on the merits. *Allen* v. *McCurry*, 449 U.S. 90 (1980); *Milltex Industries Corp.* v. *Jacquard Lace Co., Ltd.*, 922 F.2d 164 (2d Cir. 1991). Where the subsequent litigation involves new parties and new claims, the action is not barred by *res judicata*.

2. The Government asserts that the outcome in the *Baker* litigation binds the Screened In Plaintiffs and bars them from litigating this action. If the Government's argument that the *Baker* class [*sic*] were taken to its logical conclusion, all Haitians who have been interdicted, or who will ever be interdicted by the United States Coast Guard are forever bound by *Baker*. I find it inconceivable that the Florida district court intended to bind *all interdicted Haitians forever* when it simply maintained the class for the purposes of issuing the preliminary injunction and permitting the action to proceed. The district court granted plaintiffs' motion for class certification without holding a hearing or amending the class definition in any way. The Haitians received neither notice nor an opportunity to opt out.

3. Where the class definition is so overbroad that it fails to satisfy due process, it cannot have a *res judicata* effect. *See Finnan* v. *L.F. Rothschild & Co.*,

Inc., 726 F. Supp. 460 (S.D.N.Y. 1989) (finding that the plaintiffs suggested an "overbroad time span" for class and modifying the class accordingly); *see generally* Wright, Miller & Cooper, 7B *Federal Practice and Procedure* § 1789 (West 1981). It seems particularly unfair to bind the Screened In Plaintiffs by the outcome in *Baker* when their cause of action arises from Government conduct occurring after the conclusion of the *Baker* litigation.

4. The class of Haitian plaintiffs in *Baker* were "screened out" according to plaintiffs' description in their Memorandum in Support of Motion for Class Action Certification ("HRC Mem.").[2] Therefore, plaintiff A. Iris Vilnor, who sues on behalf of herself and all others similarly situated and seeks relief for herself and other Haitians who were "screened out" is not a new plaintiff nor is the class that she purports to represent.

5. I find, however, that the Screened In Plaintiffs are a new class which is not bound by the outcome in *Baker*.

6. The immediate relatives of "screened in" Haitians and all those similarly situated also make up an entirely new plaintiff class which was not a party to the *Baker* litigation.

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[2] The memorandum states:

> The individual plaintiffs are all Haitian emigres who were intercepted by the United States Coast Guard pursuant to a "program of interdiction" that permits interception and repatriation of undocumented aliens. They are presently being held on Coast Guard cutters and at the U.S. Naval base in Guantanamo. They have all been *'screened out'* . . . .

HRC Mem. at 2 (emphasis added).

7. Moreover, the Haitian Service Organizations in this action differ from the plaintiff organization (Haitian Refugee Center) in *Baker*. After having the opportunity to take discovery on the existence of a privity relationship between the Haitian Service Organizations and the Haitian Refugee Center, the Government has conceded that the organizations are different.

8. Therefore, *res judicata* is inapplicable to the Screened In Plaintiffs, Immediate Relative Plaintiffs, and the Haitian Service Organizations.

9. Res judicata is also inapplicable where neither the conduct complained of nor the claim had not arisen at the time of the first suit. *Prime Management Co., Inc.* v. *Steinegger*, 904 F.2d 811 (2d Cir. 1990); *N.L.R.B.* v. *United Technologies Corp.*, 706 F.2d 1254 (2d Cir. 1983); *see generally* Wright, Miller & Cooper, 18 *Federal Practice and Procedure* § 4409 (West 1981). Plaintiffs' complaint is based upon new circumstances. The INS policy of conducting second interviews to determine whether Haitians carrying the HIV virus have a well founded fear of persecution was developed after the *Baker* litigation ended. Only recently have the Haitian aliens sought the assistance of counsel. These new circumstances give rise to a new cause of action and make *res judicata* inapplicable.

10. The Screened In, Immediate Relatives and Haitian Service Organizations Plaintiffs' complaint raises new claims which were not litigated in *Baker*. For example, the Screened In Plaintiffs' statutory right of counsel, First Amendment and Fifth Amendment Due Process and Equal Protection claims are entirely new claims. As the Haitian Service Organi-

zations are new parties and their cause of action arises from the Government's post *Baker* subsequent conduct; the First Amendment claim is also new. Because the Immediate Relative Plaintiffs are a new class, all of their claims are new.

B. PRELIMINARY INJUNCTION

11. For a court to issue a preliminary injunction, the moving party must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. *Resolution Trust Corp.* v. *Elman*, 949 F.2d 624 (2d Cir. 1991).

i. *Irreparable Harm*

12. By a preponderance of the evidence, the Screened In Plaintiffs and Haitian Service Organizations have made a showing that irreparable harm is likely to result if this preliminary injunction were issued. Specifically, the Haitian Service Organizations have shown that they may suffer content-based denials of their First Amendment right to provide counseling, advocacy and representation to their clients on Guantanamo. The Screened In Plaintiffs may face torture death if they lack access to counsel, fail in their bid to receive asylum, and are repatriated to Haiti.

ii. *Serious Questions Going to the Merits*

(a) Haitian Service Organizations' First Amendment Claim

13. The Haitian Service Organizations claim that the Government has violated their first amendment

right to free speech and to associate for the purpose of providing legal counsel by denying them access to the Screened In Plaintiffs being detained on Guantanamo.

14. According to the Government, the Haitian Service Organizations have no First Amendment right of access to an alien in the custody of the United States. As authority for this assertion, the Government cites *Ukrainian-American Bar Association* v. *Baker*, 893 F.2d 1374 (D.C. Cir. 1990). This case however is distinguishable from the facts present in the instant litigation. In *Ukrainian-American Bar Association* v. *Baker*, the plaintiff brought suit alleging that the government violated their First Amendment right of access to a potential asylee in United States custody *who had neither retained the plaintiff as counsel nor asserted a right to speak with counsel.*

15. By contrast, the Screened In Plaintiffs have retained the Haitian Service Organizations as counsel and have asserted their right to speak with their attorneys. Even if the Haitian aliens lack the right to speak with an attorney, the Haitian Service Organizations would have a right to impart information to them. *See Procunier* v. *Martinez*, 416 U.S. 396, 408-09 (1974).

16. I am also unpersuaded by the Government's argument that *Kliendienst* v. *Mandel*, 408 U.S. 753 (1972), is controlling. In *Mandel*, the Supreme Court held that 1) that an unadmitted alien had no constitutional right of entry into the United States and 2) when the executive branch exercised its power to determine the admittance of an alien into the country on the basis of a facially legitimate and bona fide reason, the courts will not test its discretion by bal-

ancing its justification against the First Amendment rights of citizens seeking to communicate with the alien.

17. Here the Screened In Plaintiffs are not asserting that they have a constitutional right to enter the United States. Instead, the Haitian Service Organizations are merely asserting that *their* First Amendment rights are being violated by the Government's refusal to allow them to have access to their clients subject to reasonable time, place, and manner restrictions.

18. The Supreme Court has held that legal and political advocacy organizations' right to associate and to advise people of their legal rights are modes of expression protected by the First Amendment. *In re Primus*, 436 U.S. 412 (1978); *NAACP* v. *Button*, 371 U.S. 415 (1963).

19. Although Guantanamo Naval Base is located in Guantanamo Bay, Cuba, it is subject to the exclusive jurisdiction of the United States pursuant to a lease and treaty agreement. Therefore, the First Amendment is applicable to United States conduct on Guantanamo. *See generally, Flower* v. *U.S.*, 407 U.S. 197, 198-99 (1972) (First Amendment applicable to U.S. conduct on a military base); *Lamont* v. *Woods*, 948 F.2d 825 (2d. Cir. 1991) (Establishment Clause of the First Amendment applies extraterritorially).

20. Despite the Government's extremely broad discretion to restrict access by civilians to military bases, it may not impose content-based restrictions upon speech. *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The Government may regulate speech in areas not traditionally designated as public forums so long as these restrictions are reasonable as to time, place and manner, and are

not an effort to suppress expression merely because public officials oppose the speaker's views. *Id.* at 46.

21. In the context of the First Amendment, Guantanamo Naval Base appears to be a non-public forum. However, plaintiffs have presented evidence and the Government concedes that it is granting access to others—reporters, priests, doctors, congressmen—while denying access to lawyers. The only justification that the Government offers for its ban on lawyers is that they have an absolute right to determine the admittance of civilians.

22. As the Government's denial of access to the Haitian Service Organization appears to be a content based restriction on speech, I conclude that the Haitian Service Organizations have made a showing of serious questions going to the merits of their claim under the First Amendment.

(B) Screened In Plaintiffs' Claims

(1) Statutory Claim

16 [*sic*]. The standard for review of an applicant's asylum claim is whether the applicant has a well-founded fear of persecution if returned to his or her own country. *INS* v. *Cardoza Fonesca*, 480 U.S. 421, 107 S.Ct. 1207 (1987). Asylum officers on Guantanamo are using the same standard when conducting second interviews of Haitian aliens in United States custody. But these aliens are being [*sic*] the procedural protections such as the right to counsel that they would be afforded if they were being held in custody in the United States.

23. Under INS regulations, applicants for asylum have a right to counsel, to present witnesses, to submit affidavits, and to present any relevant evidence

during an asylum interview conducted by an asylum officer. 8 C.F.R. § 208.9 (1991). Detained asylum applicants also have a right to receive a list of persons or private agencies that can assist them in their application for asylum. *Id.* at § 208.5.

24. If an alien's claim is rejected by an Asylum Officer, his "application for asylum or withholding of deportation may be renewed before an Immigration Judge in exclusion or deportation hearings." 8 C.F.R. § 208.18(b) (1991). In any such hearing, plaintiffs have the right to be represented by counsel. 8 U.S.C.A. § 1362.

25. Even though I believe that the Haitian aliens are de facto asylees,[3] I must find as a matter of law that their statutory claim fails because the Immigration and Naturalization Act ("INA") expressly states that "[t]he term 'United States [*sic*], except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. 1101 (a)(38). As the statute fails to specifically identify Guantanamo Bay Naval Base as being within the jurisdiction of the United States for the purposes of the INA and INS regulations, I must conclude that the statutory right to counsel under 8 U.S.C.A. § 1362 and 8 C.F.R. § 208.9 does not extend to the Haitian aliens currently in custody on Guantanamo.

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[3] The Government suggests that the Haitians on Guantanamo are like refugees seeking asylum at the United States embassy in Moscow. However, the record in this case belies this analogy. A Russian refugee is free to walk out of the embassy if denied asylum. The Haitian aliens on Gantanamo are held in custody behind barbed wired fences.

(2) Constitutional Claims

26. Although the Screened In Plaintiffs' INA claim must fail, there are sufficiently serious questions going to the merits of their Due Process claim to make such claim fair ground for litigation. Congress may circumscribe the parameters of United States territory for purposes of the immigration laws, but such definition is not applicable to the U.S. Constitution unless the applicable provision of the Constitution itself limits the definition of "United States." *See Downes* v. *Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901). And, just as the defendants aver that the question of whether certain domestic legislation covers activities at Guantanamo is separate from the issue of whether the criminal laws of the United States are applicable thereto, so too, the question of whether the First and Fifth Amendments apply to the screened in plaintiffs is a distinct issue.

27. Neither the due process nor equal protection clauses of the Fifth Amendment provides a circumscribed definition of the United States. Guantanamo is within United States territory subject to the exclusive control and jurisdiction of the United States pursuant to a lease and treaty. *United States v. Verdugo-Urquidez*, —— U.S. ——, 110 S.Ct. 1056 (1990) is therefore not dispositive of the rights of the screened in plaintiffs under the Fifth Amendment, even by way of analogy, because *Verdugo-Urquidez* holds that a nonresident alien may not assert a violation of the Fourth Amendment where such violation occurred on *foreign* soil. The Court has expressly stated that it believes that the Fourth Amendment operates in a different manner than the Fifth Amendment. *Verdugo Urquidez*, 110 S.Ct. at 1060.

28. In terms of the viability of the Screened In Plaintiffs constitutional claims, this court recognizes that aliens are not necessarily afforded the same rights as citizens and that immigration laws are the province of the legislative and executive branches. The Supreme Court has stated, however, that aliens within the jurisdiction of the United States enjoy the protections of the Fifth Amendment from deprivation of life, liberty, or property without due process of law. *Mathews v. Diaz*, 426, [*sic*] U.S. 67, 78, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 *citing Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51, 70 S.Ct. 445, 453-55, 94 L.Ed. 616, 627-29 (1950); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896). "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. *Id.* at 78, 96 S. Ct. at 1890 (*citing cases*).

29. Courts have also recognized that, under certain circumstances, a non-resident, non-hostile alien may enjoy the benefits of certain constitutional limitations imposed on United States actions. *See Cardenas v. Smith*, 733 F.2d 909, 915 (D.C.Cir. 1984); *United States* v. *Toscanino*, 900 F.2d 267 *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974); *Porter v. United States*, 496 F.2d 583, 591 (Ct.Cl. 1974), *cert denied*, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 761 (1975); *compare Johnson v. Eisenstrager*, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (holding that an alien enemy had no right to writ of habeas corpus to challenge their detention by the United States military in Germany).

30. Whatever their status under the immigration laws, the Screened In Plaintiffs certainly are "persons," and therefore entitled to the protections of the Fifth Amendment. *Compare Plyler v. Doe*, 457 U.S.

189, 211, 102 S.Ct. 2382, 2391, 72 L.Ed.2d 786 (1982) (holding that an alien is a "person" within the meaning of the equal protection clause of the Fourteenth Amendment).

31. In the instant case, the screened in plaintiffs were forcibly taken from the high seas and they have been held in custody for roughly five month. Their access to the outside world, whether by telephone, mail or otherwise has been completely restricted. They are confined in a camp surrounded by razor wire and are not free to leave, even if they have the financial capability to do so, to go to another part of the world (that is, to any country but Haiti from which they flee for fear of political persecution, torture and even death). With respect to any complaints of mistreatment or otherwise, the only recourse that the screened in plaintiffs have is to military officials on Guantanamo who apparently have complete discretion as to whether and how to respond to any such complaints. Although it is formal governmental policy to treat such aliens in a humanitarian way, if the government's argument is taken to its logical conclusion, it would, of necessity, provide the aliens with no recourse even if the conduct of a U.S. official is arbitrary, capricious, and perhaps even cruel. (*See* TRO Hearing Transcript at 39). That argument is simply untenable.

32. Admittedly, Congress and the Executive branch may restrict immigration, but that is not the issue herein. Instead, the issue before this court is whether the screened in plaintiffs may challenge the U.S. government's conduct insofar as such governmental conduct has deprived them of their liberty. The screened in plaintiffs are non-hostile individuals who were brought to Guantanamo forcibly, and who are

"in custody," and incommunicado. They are unable to move about freely and choose to leave Guantanamo at their own risk to non-United States territory (*see* P.I. Hearing Transcript at 165), and cannot even make a telephone call at their own expense. They are isolated from the world and treated in a manner worse than the treatment that which would be afforded to a criminal defendant. They are defenseless against any abuse, exploitation or neglect to which the officials at Guantanamo may subject them. Given this scenario, such individuals, albeit aliens, are entitled, at the very least, to challenge such restrictions and the related conduct of U.S. officials. Indeed, the nature and circumstances surrounding the connection between the Screened In Plaintiffs and the United States warrants a finding that they are entitled to cloak themselves in the protections of the due process clause. *See Mathews v. Diaz, supra.* Based on the foregoing, I conclude that there are serious questions going to the merits of the Screened Plaintiffs due process claim. *See Mathews v. Diaz, supra.*

(c) Other Claims

33. In light of the importance of the issues raised and the need for further consideration, I will reserve judgment on all other claims not addressed herein and I will issue a decision with respect thereto at a later date and, if appropriate after argument is heard on Defendants' Motion to Dismiss under 12(b)(6).

iii. *Balance of the Hardships*

34. The Government argues that the issuance of a preliminary injunction will create a "magnet effect" drawing more Haitians to the high seas and will in-

crease the Government's financial burden. After carefully weighing the hardships, I find that the balance tips decidedly in favor of the Plaintiffs. Moreover, I find that the [*sic*] any burden placed on the Government in permitting attorneys access to their clients for the purpose of interviewing would be minimal.

C. BOND

35. The Government has repeatedly asked the court to impose a bond on the Plaintiffs. Under particular circumstances, a court may exercise its discretion and waive the bond required under F.R.C.P. 65(c). *See United States* v. *Bedford Associates*, 618 F.2d 904, 916-17 n. 23 (2d Cir. 1980). After considering the non-profit status of the Haitian Service Organizations and the indigence of the Screened In Plaintiffs, the Plaintiffs are ordered to post a bond in the amount of $5,000.

D. Plaintiffs' Application for an Order Preventing Harassment

36. Plaintiffs have failed to put forth sufficient evidence to support their claim that the Government is harassing them because of their involvement in this lawsuit. Therefore, this court will not exercise its authority to issue an order.

E. Class Certification

F.R.Civ.P. 23 is given liberal construction and the court must take the allegations of the merits of the case, as set forth in the complaint, to be true. It is the party who seeks to utilize Rule 23 that bears the burden of establishing that the requirements of that rule are satisfied. *Cruz v. Robert Abbey, Inc.*, 778

F.Supp. 605, 612 (E.D.N.Y. 1991). The Screened in Plaintiff's [*sic*] have satisfied the basis requirements of Rule 23(b)(2) and, as such, they are entitled to maintain this action as a class action. Although the Screened In Plaintiff's motion for class certification is granted at this time, because the defendant challenges certain of plaintiff's factual allegations, I will permit them to conduct discovery and then this court will hold a hearing to ascertain whether the class certification herein granted should be modified. The court has chosen not to address the certification of the Immediate Relative Plaintiffs' motion for class certification in this Memorandum and Order.

III. *RELIEF*

For the reasons stated above, it is hereby:

ORDERED, that the defendants are preliminarily enjoined pursuant to F.R.C.P. 65 from:

a) denying plaintiff service organizations access to their clients for the purpose of providing them legal counsel, advocacy, and representation when scheduled for interviews;

b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian citizen currently being detained on Guantanamo (I) who has been screened in and (II) who is being detained or has been denied an opportunity to communicate with counsel; and

c) repatriating any Haitian alien being detained on Guantanamo (I) who had been screened in and (II) who has been denied the opportunity to communicate with counsel.

So ordered.

/s/ Sterling Johnson, Jr.
United States District Judge

Dated: Brooklyn, New York
April 6, 1992

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 CV 1258

HAITIAN CENTERS COUNCIL, INC., NATIONAL COALITION FOR HAITIAN REFUGEES, INC., IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION, OF NEW HAVEN CONNECTICUT; DR. FRANTZ GUERRIER, PASCAL HENRY, LAURITON GUNEAU, MEDILIEU SOREL ST. FLEUR, DIEU RENEL, MILOT BAPTISTE, JEAN DOE, AND ROGES NOEL ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED; A. IRIS VILNOR ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED; MIREILLE BERGER, YVROSE PIERRE AND MATHIEU NOEL ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

- against -

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, WILLIAM P. BARR, ATTORNEY GENERAL; IMMIGRATION AND NATURALIZATION SERVICE; JAMES BAKER, III, SECRETARY OF STATE; REAR ADMIRAL ROBERT KRAMEK AND ADMIRAL KIME, COMMANDANTS, UNITED STATES COAST GUARD; AND COMMANDER, U.S. NAVAL BASE, GUANTANAMO BAY, DEFENDANT.

[Filed July 29, 1992]

MEMORANDUM AND ORDER

Johnson, District Judge:

Plaintiffs have moved on Order to Show Cause for a temporary restraining order pursuant to Fed. R. Civ. P. 65 restraining the Government from repatriating, under the May 24th Executive Order, any interdicted Haitian to Haiti whose life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. For the reasons stated below, the court declines to grant the relief sought.

BACKGROUND [1]

On May 24, 1992, the United States dramatically altered its policy toward Haitian refugees fleeing the political upheaval in Haiti. The President issued an Executive Order under which any Haitian interdicted beyond the territorial waters of the United States must be returned directly to Haiti without being afforded the opportunity to undergo INS refugee screening. Plaintiffs quickly moved on Order to Show Cause for a temporary restraining order pursuant to Fed. R. Civ. P. 65 restraining the Government from acting pursuant to the May 24th Executive Order.

At a hearing on May 29, 1992, the Plaintiffs asserted that the Government's actions violate 1) the United States' obligations under Article 33 of U.N. Protocol Relating to the Status of Refugees; and 2) Section 243(h) of the Immigration and Nationality

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[1] The court assumes familiarity with the facts and issues in this case. For a more detailed discussion of the history of this litigation *see* Memorandum and Order dated March 27, 1992 and Memorandum and Order dated April 6, 1992.

Act ("INA"). At the close of the hearing, the court reserved decision in order to consider the briefs submitted by the parties and to give careful attention to the weighty issues presented.

DISCUSSION

The Government contends that the relief sought by the Plaintiffs is tantamount to a request for a mandatory injunction. The court agrees that the relief sought is closer to a request for more permanent injunctive relief and construes Plaintiffs' application as a request for a preliminary injunction. For a court to issue a preliminary injunction, the moving party must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. *Resolution Trust Corp.* v. *Elman*, 949 F.2d 624 (2d Cir. 1991). Although the Plaintiffs undeniably makes a substantial showing of irreparable harm, the court finds that the Plaintiffs are unlikely to succeed on the merits.

Article 33 of the U.N. Protocol Relating to the Status of Refugees provides that "no contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion." On its face, Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution. Notwithstanding the explicit language of

the Protocol and dicta in Supreme Court cases such as *INS* v. *Cardoza Fonseca*, 480 U.S. 421 (1987) and *INS* v. *Stavic*, 467 U.S. 407 (1984), the controlling precedent in the Second Circuit is *Bertrand* v. *Sava* which indicates that the Protocols' provisions are not self-executing. *See* 684 F.2d 204, 218 (2d Cir. 1982).

It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitians refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle or non-refoulement.[2] As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on unless Congress enacts legislation implementing its provisions or a higher court reconsiders *Bertrand*. Until that time, however, this court feels constrained by the rationale of *Bertrand* and cannot grant the Plaintiffs relief on this claim.

Finally, this court concluded in an earlier decision in this case that the right to counsel under the INA did not extend to Haitian aliens who were located outside the United States as defined by the statute. *See* Memorandum and Order dated April 6, 1992, ¶ 26. This issue is currently on appeal before the Second Circuit. Unless the Court of Appeals rules otherwise, the court must again conclude that the Section 243(h) is simi-

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[2] Only recently, the United States criticized Great Britain for its forcible repatriation of Vietnamese boat people, whom Great Britain have classified as 'economic migrants'. *See* Daniela Deane, *Britain to Ignore U.S. Pleas on Return of Boat People*, Washington Post, January 26, 1990, at A18.

larly unavailable as a source of relief for Haitian aliens in international waters.

CONCLUSION

Accordingly, the relief requested by the Plaintiffs is hereby denied.

So ordered.

/s/ Sterling Johnson, Jr.
STERLING JOHNSON, JR.
United States District Judge

Dated: Brooklyn, New York
June 5, 1992

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 CV 1258

HAITIAN CENTERS COUNCIL, INC., NATIONAL COALITION FOR HAITIAN REFUGEES, INC., IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION, OF NEW HAVEN CONNECTICUT; DR. FRANTZ GUERRIER, PASCAL HENRY, LAURITON GUNEAU, MEDILIEU SOREL ST. FLEUR, DIEU RENEL, MILOT BAPTISTE, JEAN DOE, AND ROGES NOEL ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED; A. IRIS VILNOR ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED; MIREILLE BERGER, YVROSE PIERRE AND MATHIEU NOEL ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF,

- against -

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, WILLIAM P. BARR, ATTORNEY GENERAL; IMMIGRATION AND NATURALIZATION SERVICE; JAMES BAKER, III, SECRETARY OF STATE; REAR ADMIRAL ROBERT KRAMEK AND ADMIRAL KIME, COMMANDANTS, UNITED STATES COAST GUARD; AND COMMANDER, U.S. NAVAL BASE, GUANTANAMO BAY, DEFENDANT.

ORDER

Johnson, District Judge:

In accordance with the July 29, 1992 decision of the Court of Appeals for the Second Circuit reversing this court's decision in Memorandum and Order dated June 5, 1992 and remanding the case to this court with instructions to enter an injunction, it is hereby:

ORDERED, that the defendants are preliminarily enjoined pursuant to Fed. R. Civ. P. 65 from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

So ordered.

/s/ Sterling Johnson, Jr.
STERLING JOHNSON, JR.
United States District Judge

Dated: Brooklyn, New York
July 29, 1992

APPENDIX G

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-6060

HAITIAN REFUGEE CENTER, INC., *et al.*,
PLAINTIFFS-APPELLEES,

v.

JAMES BAKER, III, Secretary of State, ROBERT KRAMEK, Rear Admiral, KIME, Admiral, Commandant, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, UNITED STATES DEPARTMENT OF JUSTICE, Immigration and Naturalization Service, UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Southern District of Florida

Rehearing and Rehearing En Banc
Denied Jan. 28, 1992

Dec. 17, 1991

Before TJOFLAT, Chief Judge, HATCHETT and COX, Circuit Judges.

PER CURIAM:

On December 3, 1991, the district court issued a preliminary injunction prohibiting the defendants, James Baker, III, and others from forcefully repatriating Haitians in their custody. The defendants appeal. The appeal has been expedited and is now ripe for decisions on the merits.

The district court's order granting the preliminary injunction was grounded on a finding that there was a substantial likelihood that the plaintiffs would prevail on the merits of two judicially enforceable claims: (1) "HRC's right of association and counsel, which arises from the First Amendment to the United States Constitution;" and (2) "the Haitian plaintiffs' right of nonrefoulment, which arises under Article 33 of the 1967 United Nations Protocol Relating to the Status of Refugees."

[1] Ordinarily, the grant of a preliminary injunction is reviewed for abuse of discretion; however, if the trial court misapplies the law we will review and correct the error without deference to that court's determination. *Cable News Network, Inc. v. Video Monitoring Servs., Inc.*, 940 F.2d 1471, 1477 (11th Cir.1991).

In order to prevail on a motion for preliminary injunction, the movant has the burden of proving: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) its own injury outweighs the injury to the nonmovant; and (4) the injunction would not disserve the public interest. *Id.* at 1478, *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir.1990).

[2] Defendants argue that the Haitian plaintiffs in this case have no enforceable rights under Article 33 because Article 33 is not self-executing as to persons situated like the plaintiffs in this case. The individual Haitians who are plaintiffs in this case have not reached United States territory.

[3] The language of the Protocol and the history of the United States' accession to it leads to the conclusion that Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case. (A "self-executing" international agreement is one that directly accords enforceable rights to persons without the benefit of Congressional implementation.) *See Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir.1987) (Edwards, J. concurring in part and dissenting in part); *Bertrand v. Sava*, 684 F.2d 204 (2nd Cir.1982); *Pierre v. United States*, 547 F.2d 1281 (5th Cir.1977), *vacated on other grounds*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977).

[4] Next, the defendants argue that even if the plaintiffs had a First Amendment right of access to the interdicted Haitians, the relief granted by the injunction is unrelated to the right asserted by HRC. The district court's injunction order states as follows:

> [D]efendants are hereby enjoined from forcefully repatriating the individual plaintiffs or class members in their custody either until the merits of the underlying action are resolved or until defendants implement and follow procedures, such as those contained in the INS Guidelines, adequate to ensure that Haitians with bona fide political asylum claims are not forced to return to Haiti in violation of Article 33 of the

Protocol. To this end, within seven days defendants shall submit to the court a recital of the procedures to be followed.

The district court's order is not merely overly broad, *see United States v. Gilbert*, 920 F.2d 878 (11th Cir. 1991), it fails to redress the right asserted by HRC. Here, HRC asserts a right of access to the interdicted Haitians. The injunctive relief granted by the district court does not require the defendants to allow HRC access to the Haitian interdictees, it enjoins the defendants from repatriating them. Because the relief granted does not address the right of access asserted by HRC, the First Amendment claim cannot support the injunction.

[5] Judge Hatchett, in dissent, would uphold the issuance of the preliminary injunction on the basis of the APA claim. The district court refused to grant relief on this claim. The plaintiffs do not cross-appeal. We cannot properly uphold the injunction based on the APA claim under these circumstances. Furthermore, to do so would constitute a holding by this court, on appeal, that the plaintiffs are entitled to injunctive relief on the APA claim as a matter of law.

For the foregoing reasons, the preliminary injunction issued by the district court is hereby DISSOLVED and the case is REMANDED to the district court with instructions to dismiss, on the merits, the claims predicated on Article 33.

The mandate shall issue immediately and no petition for panel rehearing will be entertained.[1]

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[1] This brief opinion is filed in order to expedite disposition of the appeal. No supplemental opinion will be filed.

HATCHETT, Circuit Judge, dissenting:

I respectfully dissent. The district court properly issued the preliminary injunction in this case. Additionally, I dissent from the majority's decision that although this court has jurisdiction over this case, the scope of our jurisdiction is not broad enough to afford review of the district court's refusal to grant the preliminary injunction on the Administrative Procedures Act (APA) claim.

A. FACTUAL MATTERS

It is important to put this case in proper context through consideration of factual matters borne out by the record.

1. Under existing law, any refugee may reach the shores of the United States and thereby acquire the right to enforce United States immigration laws in United States courts, except Haitian refugees. Only Haitian refugees are intercepted in international waters and repatriated to their country of origin. This activity is conducted under an agreement between the Reagan administration and the totalitarian Haitian government in place in 1981, the regime of Jean-Claude Duvalier.

2. The government asserts that prior to the district court's entry of the preliminary injunction, it fairly and adequately applied United States immigration laws to the refugees' claims of political asylum. The district court's preliminary injunction provides that the government refrain from repatriating Haitian refugees until the court has determined the merits of this case or until the government submits a plan out-

lining its screening procedures.[1] Consequently, the district court has ordered the government to do no more than the government maintains it was already doing. Thus, the order does not harm the government at all, and certainly imposes no "irreparable harm." The balance of harms in this case tips decidedly in favor of the Haitian refugees, who face injury or death if wrongfully repatriated.

3. A simple reading of the district courts preliminary injunction belies the governments argument that the district court has barred it from returning these refugees to Haiti. At most, the preliminary injunction *delays* the return of refugees not entitled to political asylum in the United States. Nothing in the preliminary injunction can lead one to conclude that these refugees must either be brought to the United States or carried to Guantanamo Bay, Cuba, to be held indefinitely.

4. The government seeks to convince this court that its interdiction program was instituted as an effort to have the lives of Haitian refugees traveling in unseaworthy vessels. But the government's own brief shows that the program was instituted in 1981, long before the current immigration wave, for the express purpose of more efficiently enforcing United States immigration law. The primary purpose of the program was, and has continued to be, to keep Haitians out of the United States.

5. At the bottom of this case is the government's decision to intercept Haitian refugees on the high seas, in international waters, to prevent them from reaching United States territory. If these refugees reach

[1] The government has not submitted such a plan.

United States territory, they will have the right to insist, in United States courts, that they be accorded proper, fair, and adequate screening procedures.[2] In addition, they will receive counseling from the Haitian Refugee Center (HRC) and volunteer lawyers who will ensure the proper application of United States immigration laws. The interdiction program is a clear effort by the government to circumvent this result.

The United Nations Protocol on Refugees, and the United States immigration laws which execute it, were motivated by the World War II refugee experience. Jewish refugees seeking to escape the horror of Nazi Germany sat on ships in New York Harbor, only to be rebuffed and returned to Nazi Germany gas chambers. Does anyone seriously contend that the United States's responsibility for the consequences of its inaction would have been any less if the United

[2] In its Reply Brief the government states: As explained in our opening brief, the Executive Order and the INS guidelines are fully compatible with Article 33: if an INS interview suggests that a legitimate claim to refugee status exists, the person is to be removed from the interdicted vessel and transported to the United States, where the statutory provisions for withholding of deportation and asylum become applicable, as do our international obligations under the Protocol.

This is a long way of saying that the government will afford political asylum to those refugees it cares to, but will not afford any opportunity for review for those it denies relief. Consequently, the government will apply United States law to these refugees—in the middle of the sea—but will not have the application of United States law tested in United States courts. Since no other forum is available, the refugees are completely at the mercy of their captors. In fact, the capture prevents the refugees from seeking asylum in other countries.

States had stopped the refugee ships *before* they reached our territorial waters? Having promised the international community of nations that it would not turn back refugees at the border, the government yet contends that it may go out into international waters and actively prevent Haitian refugees from reaching the border. Such a contention makes a sham of our international treaty obligations and domestic laws for the protection of refugees.

6. Through this lawsuit, these refugees are not requesting admission to the United States, but are only seeking to have their claims for political asylum fairly considered.

B. JURISDICTION AND APPEALABILITY

HRC contended in the court below that the APA gives it a cause of action to challenge the actions of lower executive branch officials in carrying out the interdiction program. The district court held that the APA afforded no such relief, on the grounds that the challenged agency actions were committed to agency discretion, and thus exempt from review. HRC properly seeks review of this adverse determination on appeal. The majority contends, however, that this court may not review the district court's holding on the APA claim because the district court ultimately granted injunctive relief on other grounds.

The denial or granting of a preliminary injunction gives this court jurisdiction to decide all the issues on which the district court ruled, and the preliminary injunction may be upheld on the basis of any valid claim. 28 U.S.C. § 1292(a)(1). We are called upon to decide whether the preliminary injunction was properly issued on any ground asserted and determined. By not reviewing the APA claim, the majority takes an unrealistic and narrow view of this court's jurisdiction and role. In this highly expedited case, concerns of finality and conservation of judicial labor favor the swift resolution of all claims upon which the district court ruled.

Section 1292(a)(1) provides, in pertinent part:

> "[T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, or *refusing* or dissolving injunctions, or refusing to dissolve or modify injunctions, ..." (Emphasis added.)

The district court *refused* to grant the refugees the preliminary injunction on their APA claim; therefore, no jurisdictional impediment exists which prevents this court from reaching and deciding whether the preliminary injunction is proper based on the APA claim. *See Roberts v. St. Regis Paper Co.*, 653 F.2d 166 (5th Cir.1981). This court should reach and determine the merits of the APA claim.[3]

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[3] In *Jean v. Nelson*, 727 F.2d 957 (11th Cir.1984) (en banc), this court recognized that a reviewing court could uphold the relief granted by the lower court on grounds different from those relied upon by the lower court. The en banc court in *Jean* rejected the district court's holding that the plaintiffs (Haitians) could assert due process and equal protection challenges to the government's decision to detain or parole excludable aliens. 727 F.2d at 963. The court went on to hold however, that the Haitians could challenge the government's decision to detain them under an abuse of discretion standard. 727 F.2d at 975-76. The court stated:

> The district court erred to the extent that it based its jurisdiction to review these determinations on constitutional grounds. The basis for jurisdiction here must be

C. ARTICLE 33

The majority holds that the district court erred in concluding that the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol), which incorporates Article 33 of the 1951 Convention Relating to the Status of Refugees, gives refugees outside the territorial boundaries of the United States the right to press in domestic courts claims that the United States is violating obligations under the Protocol treaty.[4] Because Article 33 is self-executing and applies extra-territorially, I would uphold the preliminary injunction.

In the Protocol, a refugee is defined as any person who,

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwill-

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found elsewhere, in the principle that agencies must respect the statutory limits on their discretion, and in the recognition that agency deviation from its own internal regulations and procedures may justify judicial relief in a case otherwise properly before the court. 727 F.2d at 976 [internal quotations and citation omitted].

Thus in *Jean*, this court, sitting en banc, explicitly recognized that it could grant relief on grounds not even before the district court, especially where, as here, the substance of the claim for relief involves "agency deviation from its own regulations and procedures." 727 F.2d at 976.

[4] This provision will be referred to as Article 33. The Protocol incorporates articles 2 through 34 of the Convention. The United States acceded to the protocol on November 1, 1968. 19 U.S.T. 6223; T.I.A.S. 6577.

> ing to avail himself of the protection of that country.

Protocol, art. 1, ¶ 2, 19 U.S.T. 6223, 6225; T.I.A.S. No. 6577 at 3. Article 33, which is incorporated into the Protocol, provides:

> No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Convention Relating to the Status of Refugees, art. 33, ¶ 1, 198 U.N.T.S. 150, 176 (July 28, 1951). Additionally, Article 3 of the Convention provides that the provisions of the Protocol are to be applied to all refugees without discrimination as to race, religion or country of origin. *See* Convention, art. 3, 189 U.N.T.S. 150 (July 28, 1951). The majority holds that Haitian refugees outside the territorial boundaries of the United States have no right to challenge whether the procedures which implement the United States interdiction program violates the principles in the Protocol, regardless of whether the procedures are inadequate to ensure that refugees are not returned to territories where their lives or freedom will be threatened on account of their race, religion, nationality, membership in particular social groups or political opinions.

The majority so holds even though citizens or subjects of other nations ordinarily can enforce a treaty in the domestic courts of the United States to the extent that the treaty's provisions confer certain rights upon them and take on the nature of domestic law.

See Edye v. Robertson, 112 U.S. 580, 598-99, 5 S.Ct. 247, 253-54, 28 L.Ed. 798 (1884). The former Fifth Circuit held that "treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing." *United States v. Postal*, 589 F.2d 862, 875 (5th Cir.), *cert. denied*, 444 U.S. 832, 100 S.Ct. 61, 62 L.Ed.2d 40 (1979); *see also Whitney v. Robertson*, 124 U.S. 190, 8 S.Ct. 456, 31 L.Ed. 386 (1888). The provision of the Protocol which provides non-refoulement protection to refugees outside the United States has not been given effect by congressional legislation. *See Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982) (holding that Congress has implemented the Protocol, at least in part, through the Refugee Act of 1980, but noting that the Refugee Act does not provide rights to aliens outside the United States). Nevertheless, the Protocol affects the domestic law of the United States and is binding upon the government to the extent that it is self-executing. *See Postal*, 589 F.2d at 875.

In *Postal*, the court held that "whether a treaty is self-executing is a matter of interpretation for the courts." *Postal*, 589 F.2d at 876. Additionally, the court noted in *Postal* that in determining self-execution, courts consider the parties' intent, the legislative history, and the subject matter of the treaty. *Postal*, 589 F.2d at 876-77. However, the court also noted that it is difficult to ascribe a common intent to the language of a multilateral treaty which indicates a manifest purpose for the treaty to operate as the domestic law of the ratifying nations by its own force. *See Postal*, 589 F.2d at 878; *see also* Iwasawa, *The Doctrine of Self-Executing Treaties in the United States; a Critical Analysis*, 26 Va.J. Int'l

L., 627, 656 n. 122 (1986); Note, *Interdiction: The United States Continuing Violation of International Law*, 68 B.U.L.Rev. 773, 780 (1988). Thus, consideration of the intent of the parties to the Protocol is least helpful, and the majority should have limited its consideration to the subject matter, legislative history, and subsequent treaty construction. *See Postal*, 589 F.2d at 876-77.

The Protocol's subject matter supports the proposition that the treaty is self-executing, because it neither explicitly calls for legislation nor requires positive legislative action, such as the appropriation of money or the imposition of sanctions. *See Postal*, 589 F.2d at 877; Note, *Interdiction*, 68 B.U. L.Rev. at 781. Additionally, the legislative history surrounding the Protocol further supports the conclusion that the treaty is self-executing. For example, the committee report recommending accession provided that the United States is automatically bound to apply articles 2 through 34 of the convention. *See* Sen. Exec.Rep. No. 14, 90th Cong., 2d Sess. (1968); *see also* Note, *Interdiction*, 68 B.U. L.Rev. at 785-86.

Finally, the subsequent construction of the Protocol also supports the proposition that it is self-executing. *See Nicosia v. Wall*, 442 F.2d 1005, 1006 n. 4 (5th Cir. 1971) (without recognizing implementing legislation, the court noted that the Protocol binds acceding states to apply certain provisions of the 1951 Refugee Convention); *Fernandez-Roque v. Smith*, 539 F.Supp. 925, 935 n. 25 (N.D.Ga.1982) (inclined towards view of self-execution); *see also Sannon v. United States*, 427 F.Supp. 1270, 1274 (S.D.Fla. 1977) (holding that Protocol established aliens' right to a hearing), *vacated and remanded on other grounds*, 566 F.2d 104 (5th Cir.1978); *Matter of*

Dunbar, Interim Decision of Board of Immigration Appeals No. 2192,310 at 313 (April 17, 1973) (stating in regard to protocol that "such a treaty, being self-executing, has the force and effect of an act of Congress"); *but see Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir.1982) (holding that "the Protocol provisions were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation"); *Haitian Refugee Center, Inc. v. Gracey*, 600 F.Supp. 1396, 1403-04 (D.D.C.1985) (holding the same as *Bertrand v. Sava*), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir.1987). Thus, although the intent of the parties is unclear, the subject matter, legislative history, and subsequent construction of the Protocol support the proposition that the Protocol is self-executing and binding upon the United States in accordance with Article VI of the United States Constitution.

After establishing that the Protocol is self-executing, the question becomes whether the Protocol's protections apply to refugees outside the territorial boundaries of the United States. The Supreme Court stated in *United States v. Stuart*, 489 U.S. 353, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989) that "the clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Stuart*, 489 U.S. at 365-66, 109 S.Ct. at 1191 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S.Ct. 2374, 2377, 72 L.Ed.2d 765 (1982)). In his concurrence, Justice Scalia was even more emphatic, stating that "our traditional rule of treaty construction is that an agreement's language is the best evidence of its purpose and its parties intent." *Stuart*, 489 U.S. at 372, 109 S.Ct. at 1194. (Scalia, J., concurring). Article 33 unequivocally provides that "[n]o contracting state shall *expel* or *return* (refouler) a refugee," fleeing bona fide political persecution, "*in any manner whatsoever* to . . . territories where [the refugee's] life or freedom would be threatened." Article 33, 198 U.N.T.S. at 176 (emphasis added). As noted earlier, it is difficult to ascribe a common intent to the language of a multilateral treaty. *See Postal*, 589 F.2d at 878. Therefore, the clear import of the treaty language must control in determining the purpose of the treaty. *Compare United States v. Postal*, 589 F.2d 862, 875 (5th Cir.1979) (difficult to ascribe a common intent to the language of a multilateral treaty) *with United States v. Stuart*, 489 U.S. 353, 365-66, 109 S.Ct. 1183, 1191, 103 L.Ed.2d 388 (1989) (clear import of treaty language controls unless inconsistent with intent).

The Supreme Court also stated in *Stuart* that "the practice of treaty signatories counts as evidence of the treaties' proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *Stuart*, 489 U.S. at 369, 109 S.Ct. at 1193. Executive Order 12324 and the accompanying guidelines reflect the United States's understanding that the prohibition against refoulement is binding and protects Haitians interdicted on the high seas. Moreover, the district court correctly noted:

> it seems substantially unlikely that a protocol designed to protect refugees fleeing bona fide political persecution could have been intended not to provide protection to the Haitians fleeing

> the brutal, military regime now in power on the ground that those fleeing had not yet reached the territory of a party to the Protocol.

The United Nations High Commission for Refugees asserts that the terms of Article 33 and the nonrefoulement principle apply extraterritorially. The Supreme Court held in *Stuart* that

> given that a treaty should generally be 'construed . . . liberally to give effect to the purpose which animates it,' and that 'even where a provision of a treaty fairly admits two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'

Stuart, 489 U.S. at 368-69, 109 S.Ct. at 1192-93 (quoting, *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163, 61 S.Ct. 219, 225-26, 85 L.Ed. 98 (1940)). Thus, Haitians interdicted on the high seas outside the territorial boundaries of the United States are entitled to the Protocol's protections.

D. FIRST AMENDMENT

The district court did not err in finding a substantial likelihood of success on the grounds that the government had violated the Haitian Refugee Center's (HRC) First Amendment right of access to the interdicted Haitians. As this court has held, "counsel have a First Amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration." *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984) (en banc); *see also In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978); *NAACP v.*

Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). HRC seeks to exercise precisely such a right of access in this case. The fact that the Haitian refugees are currently outside the borders of the United States does not diminish HRC's right of access. The Haitian Refugee Center, a Florida nonprofit corporation, may invoke constitutional rights that are impaired by U.S. Government action abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 270, 110 S.Ct. 1056, 1063, 108 L.Ed.2d 222 (1990); *Reid v. Covert*, 354 U.S 1, 7, 77 S.Ct. 1222, 1225, 1 L.Ed.2d 1148 (1957).[5]

With respect to the Guantanamo Bay Naval Station, an area under the "complete jurisdiction and control" of the United States, HRC is entitled to First Amendment protection. Of course, HRC's First Amendment rights are constrained by the government's strong interest in regulating activities on its

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[5] The majority obviously accepts the government's contention that *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), controls HRC's first amendment claim. In *Kleindienst*, the plaintiffs claimed that their first amendment rights were violated by the exclusion of a foreign Marxist. In the instant case, HRC claims its first amendment rights are violated by the government's refusal to give it access to Haitians detained at Guantanamo Bay. The court's holding in *Kleindienst* that the plaintiffs' first amendment rights could not compel the government to grant entry to an excluded alien is simply irrelevant to the relief demanded by HRC in the instant case. Here, HRC seeks not entry of the Haitians, but access to them at the places where they are held by the U.S. government. Thus, the case is far more analogous to the facts in *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir.1984) (en banc), where the court found a right of access, than to *Kleindienst*, where the court found no right of entry.

military bases. Like most military bases, the Guantanamo Bay Naval Station is a "nonpublic forum." *See MNC Hinesville v. United States Dept. of Defense*, 791 F.2d 1466, 1473 (11th Cir.1986). Consequently, the government may reserve it entirely for its intended purpose as a military base, so long as any restriction on speech is reasonable and content neutral. *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983).

The district court correctly found that the government acted unreasonably in denying HRC access to the interdicted Haitians. HRC seeks access only to that part of Guantanamo Bay used to detain interdicted Haitians. In that area, the government's purely military interests are diminished while HRC's interest in counseling the Haitians is increased. The government too shares an interest in ensuring that no political refugees are wrongfully repatriated. In gaining access to the Haitians, HRC helps the United States carry out its obligations under domestic and international law. Finally, as the district court noted, HRC has no alternative means of exercising the First Amendment right it asserts in this case. I would hold that the government must afford HRC access to the interdicted Haitians detained at Guantanamo Bay, subject to reasonable, content-neutral, time, place, and manner restrictions.[6]

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[6] Contrary to the government's protestations, HRC seeks only such access as a remedy. It has never argued that a ban on repatriation is the only way to effectuate its first amendment right of access.

Even if the majority is correct in holding that the district court's preliminary injunction is too broad on the HRC's First Amendment claim, the district court should only be ordered to narrow the scope of the relief. Rather, the majority dissolves the preliminary injunction.

Because this case is alive in the district court on other issues not ruled upon, and because the preliminary injunction is well grounded in law, it should be left in place at least until the district court determines all the issues in the case.[7]

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[7] Due to the expedited nature of this case, this dissent only discusses issues the majority discusses. I agree to immediate issuance of the mandate and no further rehearing by this panel.

APPENDIX H

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 91-6099, 91-6105 and 91-6118

HAITIAN REFUGEE CENTER, INC., ET AL.,
PLAINTIFFS-APPELLEES,

v.

JAMES BAKER, III, Secretary of State, ROBERT KRAMEK, Rear Admiral, KIME, Admiral, Commandant, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, United States Department of Justice, Immigration and Naturalization Service, United States of America, DEFENDANTS-APPELLANTS.

HAITIAN REFUGEE CENTER, INC., a not-for-profit corporation, ROLAND PROVIDENCE, MOISE CHARLES, ERIC PIERRE, RAYMOND EDME, GOLBERT MIRACLE, ROLAND JEAN, ROOSEVELT ALEXIS, LUC LUXEMBOURG SANON, LEGER PIERRE FRANTZ, OCHEL ENGERILL, JEAN MICHEL MARIO AVILUS, ARCHILLE BELVU, LUCIEN ROZIER, EMMANUEL SAINTIL and CONDANSER JOSEPH, on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

v.

JAMES BAKER, III, Secretary of State, Rear Admiral ROBERT KRAMEK and Admiral KIME, Commandants, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, United States Department of Justice, Immigration and Naturalization Service, and United States of America, DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

Appeals from the United States District Court
for the Southern District of Florida.

Feb. 4, 1992

Before TJOFLAT, Chief Judge, HATCHETT and COX, Circuit Judges.

PER CURIAM:

I. FACTS AND PROCEDURAL HISTORY

In 1981, President Ronald Reagan determined that the uncontrolled immigration of visaless aliens was a "serious national problem detrimental to the interests of the United States." Proclamation No. 4865, 46 Fed.Reg. 48,107 (1981), *reprinted in* 8 U.S.C.A. § 1182 note (1982). As a result of this determination, President Reagan issued an Executive Order directing the Secretary of State to enter "cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal immigration to the United States by sea." Exec. Order No. 12324, 46 Fed.Reg. 48,109, 48,210 (1981), *reprinted in* 8 U.S.C.A. § 1182 note (Executive Order). The Executive Order required the Secretary of Transportation to instruct the Coast Guard to enforce "the suspension of the entry of undocumented aliens and the interdiction of any defined vessels carrying such aliens." *Id.* at § 2(a). Among the "defined" vessels to be interdicted by the Coast Guard were vessels of foreign nations that had entered into agreements with the

United States authorizing the United States to stop and board their vessels. *Id.* at § 2(b)(3).

The instructions given the Coast Guard were to include appropriate directives for it to stop and board defined vessels when there was reason to believe that such vessels were engaged in the irregular transportation of people or that the laws of the United States or the agreeing nation were being violated. Further, the Coast Guard was to determine the destination and status of those on board and to return the vessel to the country from which it came when there was reason to believe that the immigration laws of the United States or the foreign country were being violated. Finally, the Coast Guard was to be instructed not to return a "refugee" without his consent. *Id.* at § 2(c). These actions by the Coast Guard were authorized to be taken only outside the territorial waters of the United States. *Id.* at § 2(d).

Also pursuant to the Executive Order, the Attorney General, in consultation with the Secretary of State and the Secretary of Transportation, was to take steps necessary to "ensure the fair enforcement of our laws relating to immigration (including effective implementation of the Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland." *Id.* at § 3.

In compliance with the Executive Order, the Secretary of State entered into an agreement with the Haitian government under which the United States was authorized to interdict and board Haitian flagged vessels suspected of carrying illegal immigrants. T.I.A.S. No. 10,241. Under the agreement, it was understood that the United States would not return immigrants whom immigration officials determined to

qualify for refugee status. *Id.* Also, Haiti agreed that any immigrants returned to Haiti would not be prosecuted for illegal departure. *Id.*

An "international obligation" to which the Executive Order refers and that is at issue in this case is the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol). Article 33 of the Protocol provides in part as follows:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The term "refugee" as defined in the Protocol and incorporated in 8 U.S.C. § 1101(a)(42)(A) means:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, ...

Pursuant to the Executive Order, the Immigration and Naturalization Service (INS) promulgated guidelines to be followed by INS employees assigned to the interdiction program. The Guidelines read as follows:

INS ROLE AND GUIDELINES FOR INTERDICTION AT SEA

The following directives are to be followed by INS employees assigned to Coast Guard vessels interdicting vessels at sea pursuant to Presidential Proclamation 4865, dated September 29, 1981, and Executive Order Number 12324, dated September 29, 1981.

GENERAL

* Due to the sensitive nature of this assignment, all INS employees will be under the direct supervision of INS Central Office Headquarters, Associate Commissioner, Examinations.

* The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion.

* The duties of INS employees assigned to United States Coast Guard vessels will be limited to matters related to the interview of persons on board with respect to documentation relating to entry to the United States and possible evidence of refugee status.

* Except for independent determinations with respect to documentation relating to entry into the United States and possible claims to refugee status, INS officers will be subject to maritime

directives and rules made by the Commanding Officer of the United States Coast Guard vessel.

* * * * *

BOARDING OF VESSELS

* All decisions relating to which vessels will be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel.

* INS officers and interpreters will be members of each boarding party. INS employees will not be armed.

* All initial announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by United States Coast Guard personnel at the time the vessel is first boarded.

INS OFFICER RESPONSIBILITIES

A. To the extent that it is, within the opinion of the Commanding Officer of the United States Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person, based on their responses to the following inquiries:

1. Name;
2. Date of Birth;
3. Nationality;

4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);

5. All Documents or Evidence Presented;

6. Why did you leave Haiti;

7. Why do you wish to go to the United States;

8. Is there any reason why you cannot return to Haiti?

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and

his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicants concerning the claim).

In September, 1981, the Coast Guard began interdicting vessels suspected of carrying undocumented aliens leaving Haiti bound for the United States. Upon interdiction of the boats, the passengers were interviewed by INS officials to determine their status. If the passengers were determined to be economic migrants, and not refugees, they were repatriated to Haiti. If they were determined to have a possible claim to political asylum, they were brought to the United States to continue the asylum process. Over the ten year period from 1981 to September, 1991, over twenty-five thousands migrants were interdicted.

On September 30, 1991, the democratically elected President of Haiti, Jean-Bertrand Aristide, was overthrown in a military coup. Following the coup, the United States suspended the interdiction program. Also, economic sanctions were imposed against Haiti. As a result of the coup and the economic sanctions, migration from Haiti increased.

On November 18, 1991, the United States announced that it would resume its interdiction and repatriation program. The next day, November 19, the Haitian Refugee Center, Inc. (HRC) filed a complaint seeking declaratory and injunctive relief in the

United States District Court for the Southern District of Florida. The defendants named are James Baker, III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; Gene McNary, Commissioner, Immigration and Naturalization Service; and the United States.

HRC sought a temporary restraining order enjoining the defendants from repatriating Haitians not identified as candidates for political asylum until the implementation of procedures adequate to protect Haitians qualifying for asylum. The complaint alleges that the defendants have failed to follow INS rules and procedures that were intended to protect against the forced return to Haiti of interdictees with potentially valid claims to political asylum. The complaint further alleges that the defendants' actions violated the terms of the Executive Order 12324, the INS Guidelines promulgated pursuant to the order, and rules of international law, including Article 33 of the Protocol. Further, the complaint alleges that the defendants' actions deprived the interdictees of the protections set forth in the Refugee Act of 1980, the Immigration and Nationality Act (INA), and the due process protections of the Fifth Amendment of the Constitution. More specifically, the complaint alleges that interviews conducted on Coast Guard cutters were often as short as five minutes, were not conducted in private, and were conducted at a time when the Haitians suffered from a lack of adequate food and water and were otherwise in no condition for an adequate interview. Finally, the plaintiffs allege that the officers conducting the interviews were inadequately educated with respect to the political situation in Haiti to make sound judgments regarding claims for asylum.

The district court granted HRC's application for a temporary restraining order on November 19, 1991. The temporary restraining order precluded the defendants from repatriating Haitians on board U.S. flagged vessels or Haitians being held on land under United States control and at Guantanamo Bay, Cuba. The stated purpose of the order was to maintain the status quo "until further order."

On November 20, 1991, the defendants filed a motion to vacate the temporary restraining order or to stay the order pending appeal. These motions were denied by the district court on November 21, 1991. The district court granted plaintiffs' motion to expedite discovery and set a preliminary injunction hearing for November 27, 1991[1].

On December 3, 1991, the district court granted the plaintiffs' motion for a preliminary injunction. The district court's order was grounded on a finding that there was a substantial likelihood that the plaintiffs would prevail on the merits of two judicially enforceable claims: (1) "HRC's right of association and counsel, which arises from the First Amendment to the United States Constitution;" and (2) "the Haitian plaintiffs' right of non-refoulement, which arises under Article 33 of the 1967 United Nations Protocol Relating to the Status of Refugees."

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[1] The defendants filed an emergency appeal of the district court's temporary restraining order, filed a petition for a writ of mandamus, and sought a stay of the expedited discovery order. On November 21, this court stayed the district court's discovery order. On November 22, this court lifted the stay of discovery, dismissed the appeal of the temporary restraining order for want of jurisdictions, and denied the petition for a writ of mandamus.

After determining that the plaintiffs had shown a substantial likelihood of success on these two claims, the district court went on to conclude that there was no substantial likelihood of sucecss on the plaintiffs' remaining claims under the Fifth Amendment, the Executive Order, the INS Guidelines, the Refugee Act, the INA, and the APA.

First, the court followed settled law and found that these Haitian interdictees, who were not present in the United States, had no rights under the United States Constitution and therefore their Fifth Amendment claim must fail. Second, the court concluded that the protections afforded by the Refugee Act and the INA were limited "by the very terms of the statutes" to aliens within the United States. Therefore, the Haitian interdictees had no enforceable claim on these grounds. Third, the district court found that the Executive Order created no independent right of action and that the INS Guidelines were more akin to internal operating procedures and thus could not form the basis for a judicially enforceable claim. Finally, the district court concluded there was no substantial likelihood of the plaintiffs succeeding on their APA claim. The court concluded that the actions in question were committed to agency discretion and thus not reviewable under the APA.

The defendants appealed that part of the district court's order granting injunctive relief on HRC's First Amendment claim and claim under Article 33 of the Protocol. This court expedited the appeal. We held that Article 33 of the Protocol is not self-executing and therefore did not give rise to any rights enforceable by the plaintiffs. We further held that the First Amendment claim did not support the injunction. We held that HRC asserted a right of

access to the interdictees while the relief granted by the district court enjoined repatriation of the Haitians. Because the relief granted did not address the right asserted, the First Amendment claim did not support the injunction. We then dissolved the injunction and remanded the case to the district court with instructions to dismiss on the merits the claim based upon Article 33 of the Protocol. *Haitian Refugee Center, Inc. v. James Baker, III, Secretary of State*, 949 F.2d 1109 (11th Cir.1991). The court's mandate issued December 17, 1991.

Later that night the district court issued what purported to be another temporary restraining order. The district court had changed its mind since issuing its December 3, 1991 order and found that the plaintiffs had shown a substantial likelihood of success on their claim under the APA. The defendants filed an immediate appeal and motion for a stay pending appeal, arguing that the temporary restraining order was in effect a preliminary injunction. We agreed, concluded that we had jurisdiction and, pursuant to Fed.R.App.P. 8, stayed the order pending appeal. *Haitian Refugee Center, Inc. v. James Baker, III, Secretary of State*, 950 F.2d 685 (11th Cir.1991).

On December 20, 1991, after a hearing at which plaintiffs requested preliminary injunctive relief under the First Amendment, the Executive Order, the Refugee Act, and the INA, the district court granted "Limited Preliminary Injunctive Relief" based on HRC's claimed First Amendment right of access to the interdicted Haitians. In this order, the district court barred repatriation of the interdicted Haitians until plaintiffs' counsel was given meaningful access to the interdictees subject to reasonable, content-neutral, time, place, and manner restrictions. *Haitian*

Refugee Center, Inc. v. Baker, No. 91-2653-CIV (S.D. Fla. filed Dec. 20, 1991) (order granting limited preliminary injunctive relief). The district court denied injunctive relief based on the plaintiffs' asserted rights under the Executive Order, the INA, and the Refugee Act, finding that the plaintiffs had failed to show a substantial likelihood of success on these claims. *Id.* The defendants immediately appealed that part of the order granting relief on the plaintiffs' First Amendment claim. The plaintiffs filed a cross-appeal challenging that part of the order denying relief on the claims predicated upon the Executive Order, the INA, and the Refugee Act. This appeal and cross-appeal are docketed in this court as No. 91-6105.

On December 23, 1991, following a hearing on the plaintiffs' request for a preliminary injunction based on the APA, the district court entered an order supplementing its December 20, 1991 order. This supplemental order granted the plaintiffs' request and enjoined the defendants from forcibly repatriating the Haitian interdictees pending resolution of plaintiffs' claims on the merits or until suitable procedures were implemented. The district court stayed this order pending appeal. The defendants' appeal of this supplemental order is docketed in this court as No. 91-6118.

We consolidated the defendants' appeal of the district court's December 17, 1991 order purporting to grant a temporary restraining order under the APA (No. 91-6099), their appeal of the December 20, 1991 order granting preliminary injunctive relief under the First Amendment (No. 91-6105), and their appeal of the December 23, 1991 supplemental order granting

preliminary injunctive relief under the APA (No. 91-6118). These consolidated appeals have been expedited and are now ripe for decision.

II. ISSUES ON APPEAL

1. Whether the district court erred in granting preliminary injunctive relief on the plaintiffs' claim that the APA authorizes judicial review of the defendants' actions under the law embodied in the Protocol, the Executive Order, the INA, the Refugee Act,[2] and the INS Guidelines.

2. Whether the district court erred in denying preliminary injunctive relief on the plaintiffs' claims to independently enforceable rights under the Executive Order, the INA, the Refugee Act, the INS Guidelines, and customary international law.

3. Whether the district court erred in granting preliminary injunctive relief on the plaintiffs' claimed right of access under the First Amendment.

III. STANDARD OF REVIEW

The grant of a preliminary injunction is reviewed for abuse of discretion. However, if the trial court misapplies the law we will review and correct the error without deference to that court's determination. *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir.1991); *Tally-Ho, Inc. v. Coast*

[2] Although the plaintiffs assert a claim under the INA *and* the Refugee Act of 1980, we view their claim to be based on the INA as it has been amended by the Refugee Act of 1980. More specifically, we view their claim to be based primarily on 8 U.S.C. § 1253(h) as it was amended by the Refugee Act of 1980 and 8 U.S.C. § 1158(a) which was added to the INA by the Refugee Act.

Community College Dist., 889 F.2d 1018, 1022 (11th Cir.1989).

IV. JUDICIAL REVIEW UNDER THE APA

The plaintiffs contend that the APA authorizes review of their claims that repatriation violates the law embodied in the United Nations Protocol, the Executive Order, the INA, and the INS Guidelines. We disagree.

The plaintiffs claim that they have a right to judicial review of the defendants' compliance with the INA through the APA. We conclude that such review is precluded by the INA.

The INA expressly creates extensive rights of review regarding asylum claims and withholding of deportation claims, but only for aliens who have reached our borders. The INA provides no such provisions for review at the behest of aliens beyond our border. This leads us to conclude that Congress intended to bar review to aliens similarly situated to the plaintiffs in this case.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." 5 U.S.C. § 702. However, judicial review under the APA is not available where "statutes preclude judicial review," 5 U.S.C. § 701(a)(1), or where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

In order to determine whether Congress intended to preclude judicial review under the APA, the courts look not only at the express language of the statute but the statutory scheme as a whole. *Block v.*

Community Nutrition Institute, 467 U.S. 340, 345, 104 S.Ct. 2450, 2454, 81 L.Ed.2d 270 (1984). The presumption favoring judicial review of administrative action may be overcome by Congressional intent inferred from contemporaneous judicial construction barring review and Congress's acquiescence in it. *Block*, 467 U.S. at 349, 104 S.Ct. at 2455.

In this case, judicial review under the APA is foreclosed because the relevant provisions of the INA provide the sole and exclusive avenue for judicial review. Plaintiffs claim that the defendants have violated 8 U.S.C. § 1253(h) and contend that the defendants' determination is reviewable under the APA.

Section 1253(h) provides as follows:

> The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 1253(h) is included in Part V of the INA, which deals with deportation of aliens. The provisions of Part V dealing with deportation only apply to aliens within the United States. Therefore, 8 U.S.C. § 1252(b), which sets out the procedures for determining deportability of an alien, and which is also included in Part V of the INA, applies only to aliens "in the United States." 8 U.S.C. § 1251. Further, 8 U.S.C. § 1105a provides the exclusive procedure for judicial review of all final orders of deportation made pursuant to section 1252(b). Section 1105a provides in relevant part:

> The procedure prescribed, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against *aliens within the United States* pursuant to administrative proceedings under section 1252(b) of this title or compatible provisions of any prior Act, . . .

8 U.S.C. § 1105a(a) (emphasis added).

Contrary to the extensive procedures provided for with regard to aliens within the United States, 8 U.S.C. § 1157, which applies to refugees seeking admission from outside the United States, makes no provision for judicial review. Section 1157, as amended, gives the Attorney General discretion, within numerical limits, to permit refugees who are overseas to immigrate to the United States. No judicial review is provided for. The extensive procedures set out in section 1252(b) and the procedures for judicial review provided for pursuant to section 1105a, along with the absence of procedures for judicial review provided in section 1157, demonstrate a Congressional intent to preclude judicial review at the behest of aliens beyond the borders of the United States.

The conclusion that no right to judicial review exists for aliens who have not presented themselves at the borders of this country is supported by case law. In *Brownell v. Tom We Shung*, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225 (1956), the Supreme Court held that exclusion orders may be challenged, only by habeas corpus, but by declaratory judgment action. The Court, however, limited its holding by stating that: "We do not suggest, of course, that an alien who has never presented himself at the borders of this

country may avail himself of the declaratory judgment action by bringing the action from abroad." *Id.* at 184 n. 3, 77 S.Ct. at 255 n. 3.

In *Braude v. Wirtz*, 350 F.2d 702 (9th Cir.1965), 181 Mexican nationals brought suit to challenge an administrative determination denying them visas to enter the United States. The court held that these Mexican nationals, who had never sought admission at the borders of the United States, had no right to judicial review of the denial of their visas. In so holding the court cited the Supreme Court's language in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317 (1950). In *Shaughnessy*, the Supreme Court stated:

> When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.
>
> Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive. Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court unless expressly authorized by law to review the determination of the political branch of the Government to exclude a given alien.

338 U.S. at 542-43, 70 S.Ct. at 312.

In *Cobb v. Murrell*, 386 F.2d 947 (5th Cir.1967),[3] the Fifth Circuit followed *Braude* and held that a Mexican alien outside the United States without a visa had no standing to challenge a determination of the Secretary of Labor denying her a visa. The court went on to state that "Congress can make an administrative officer the apogee of finality, and no constitutional safeguard requires judicial review in denying entry to aliens." *Id.* at 951.[4]

Finally, in *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970 (9th Cir.1986), the Ninth Circuit affirmed the district court's dismissal of the case for lack of jurisdiction to review the acts of consular officials in denying visas. The court stated that the power of Congress to exclude aliens altogether from the country or to prescribe the conditions of such entry and to have its declared policy in that regard enforced exclusively through the executive branch, without judicial interference, is well settled. *Id.* at 971 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S.Ct. 2576, 2583, 33 L.Ed.2d 683 (1972).

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[4] Plaintiffs argue that *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir.1961), supports their position that the APA should be applied in this case. *Estrada* dealt with an alien who held a valid visa and subsequently was refused entry. In this case the plaintiffs have never reached the United States so *Estrada* is not controlling. Further, the court in *Estrada* distinguishes the facts of its case from those of an alien initially applying for a visa. The court stated that "an alien initially applying for a visa, however, may be summarily turned down by the American consul. Such refusal is usually considered immune to judicial review." *Id.* at 692 n. 2.

The foregoing cases evidence Congress's intent to preclude judicial review of administrative determinations concerning aliens who have never presented themselves at the borders of the country. Review under the APA would be inconsistent with that intent.

Assuming, *arguendo*, that the action in question is within the scope of the APA, the government argues that APA review is nevertheless barred by 5 U.S.C. § 701(a)(2). Section 701(a)(2) provides that the APA does not apply where "agency action is committed to agency discretion by law." This exception, however, is very narrow. It is applicable only when the statute granting agency discretion is so broad that it provides no law for courts to apply when reviewing the agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed.2d 136 (1971).

8 U.S.C. § 1182(f) clearly grants the President broad discretionary authority to control the entry of aliens into the United States. Section 1182(f) grants the President the discretion to act to exclude aliens "as he deems necessary." Pursuant to this power, President Reagan issued Executive Order 12324 authorizing the interdiction of illegal aliens at sea. HRC concedes that the President's order is not reviewable under the APA. They argue that the President's subordinates are not carrying out his directive and that their failure to do so is subject to judicial review[5]. Further, they argue that the defendants' actions violate 8 U.S.C. § 1253(h), which provides that the At-

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[5] The logical extension of this argument would make all of the President's discretionary decisions subject to review except in matters he can personally execute without the assistance of subordinates.

torney General shall not deport or return an alien if it is determined that he will be subject to persecution. Their claim, however, is not based on a challenge to any individual determination made by the INS officers. Rather, the plaintiffs challenge the procedure used to interview the interdictees in order to determine which ones are subject to being repatriated.

We begin by noting that this court's decision in *Greenwood Utilities Comm'n v. Hodel*, 764 F.2d 1459 (11th Cir.1985), appears to bar HRC's claim. In *Greenwood*, a panel of this court held that "[o]nly if a specific *statute* somehow limits the agency's discretion to act is there sufficient 'law to apply' as to allow judicial review." *Id.* at 1464 (emphasis added). Neither § 1182(f), § 1253(h) nor any other act of Congress relied on by the plaintiffs provide any guidance regarding the procedures to be used in making repatriation decisions with respect to aliens who have not yet reached the United States. Without such congressionally-mandated limits on agency authority, it is inappropriate for this court to exercise judicial review over the operation of the executive branch.

In a decision which appeared shortly after *Greenwood*, however, another panel of this court suggested in a footnote that "[e]ven when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations." *Florida, Dep't of Business Regulation v. United States Dep't of the Interior*, 768 F.2d 1248, 1257 n. 11 (11th Cir.1985), *cert. denied* 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1968). Although the *Florida, Dep't of Business Regulation* panel did not address *Greenwood* and relied instead upon an earlier Third Circuit decision, we will apply

the panel's analysis in *Florida, Dep't of Business Regulation* to this case.

HRC claims that INS and Coast Guard officials are violating Executive Order 12324's requirement that "no person who is a refugee will be returned without his consent." This command, however, in no way limits the discretion of INS officials in their determination of who qualifies as a refugee or the procedures to be used to make such a determination. It does not identify any specific factors to be considered or suggest how competing interests must be balanced. The determination of refugee status rests solely with the INS official. Since the Order does not constrain that official's discretion, it cannot provide this court with any "meaningful standard against which to judge the [official]'s exercise of discretion." *See Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985).

HRC also argues that the INA, international treaties, and the INS Guidelines constrain INS officials' discretion in determining who is a refugee. The Executive Order does provide that the Attorney General shall ensure fair enforcement of immigration laws and strict observance of our international obligations. As noted above, however, the INA does not extend its protection to aliens who have never entered the United States. Furthermore, although Article 33 provides that no refugee will be returned to a country if he has a well-founded fear of persecution, it provides no standards against which to judge the procedures about which the plaintiffs complain. Finally, the INS Guidelines issued pursuant to Executive Order 12324 provide no meaningful standards for judicial review.

As with the Executive Order itself, the exercise of the INS officer's discretion in determining who has a legitimate claim to refugee status is in no way constrained by the INS Guidelines. There are, therefore, no "binding regulations" which limit agency discretion in such a way as to permit meaningful judicial review. *See Florida, Dep't of Business Regulation*, 768 F.2d at 1256-57.

Because the action in question is "committed to agency discretion," HRC's claim for APA review is also barred by 5 U.S.C. § 701(a)(2).

The conclusion that APA review is not available in this situation is supported by Supreme Court precedent. In the case of *Marcello v. Bonds*, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955), the Supreme Court held that the APA was not applicable to deportation proceedings. *Marcello*, 349 U.S. at 308, 75 S.Ct. at 757. The Court discussed the case of *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950), in which it had held that the APA was applicable to proceedings under the Immigration and Nationality Act of 1917. *Marcello*, 349 U.S. at 306, 75 S.Ct. at 760. The Court noted that six months after their decision in *McGrath*, Congress legislatively overruled it by providing in a rider to the Supplemental Appropriation Act of 1951, 64 Stat. 1048, that proceedings concerning the expulsion and exclusion of aliens should not be governed by sections 5, 7 and 8 of the APA. *Id.* Next, the Court examined the procedures concerning deportation under the Immigration and Nationality Act of 1952 to determine if Congress had intended to have the APA apply to this new act. After a very detailed analysis of the deportation proceedings provided for in section 242

(b) of the then new Immigration Act, the Court stated that:

> Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in § 12 of the Act that modifications must be express. But we cannot ignore the background of the 1952 immigration legislation, its laborious adoption of the Administrative Procedure Act to the deportation process, the specific points at which deviations from the Administrative Procedure Act were made, the recognition in the legislative history of this adoptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings. Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present statute expressly supersedes the hearing provisions of that Act.

Marcello, 349 U.S. at 310, 75 S.Ct. at 762.

In a recent decision, *Ardestani v. INS*, —— U.S. ——, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991), the Supreme Court interpreted its holding in *Marcello* and held that "Congress intended the provisions of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163, as amended, 8 U.S.C. 1101 *et seq.*, to supplant the APA in immigration proceedings." *Id.* at ——, 112 S.Ct. at 518.

V. OTHER MISCELLANEOUS CLAIMS

Plaintiffs also claim that they have independent judicially enforceable rights under the Executive Order, the INS Guidelines, and the INA, as it was amended by the Refugee Act of 1980. In its order dated December 3, 1991, the district court refused to grant injunctive relief based on these claims and reiterated this holding in its order dated December 20, 1991 which granted limited preliminary injunctive relief on HRC's First Amendment claim. The plaintiffs cross-appeal, asserting that the district court erred in refusing relief on these other claims. For the reasons stated below, we agree with the district court's rulings on these issues.

A. *Plaintiffs' Claim under the INA and the Refugee Act*

The plaintiffs claim that they have judicially enforceable rights under the INA because the defendants' actions violate 8 U.S.C. § 1253(h) as it was amended by the Refugee Act. They argue that this section is applicable to them even though they have not reached the United States. They argue that the 1980 amendment to this section shows Congressional intent to extend the section's application.

Before this section was amended by the Refugee Act, § 1253(h) provided as follows:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 U.S.C. § 1253(h) (1976 ed.)

After the 1980 amendment, § 1253(h) was changed in relevant part as follows: "The Attorney General shall not deport *or return* any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country . . ." (emphasis added). Plaintiffs argue that because the amendment added the words "or return" and deleted the words "within the United States," Congress must have intended to expand the scope of the statute to include aliens beyond the borders of the United States. We disagree.

As discussed above in Section IV, section 1253(h) is found in Part V of the INA, which deals with deportation and adjustment of status. The provisions of Part V of the INA dealing with deportation only apply to aliens "in the United States." 8 U.S.C. § 1251, 1253(a); *Haitian Refugee Center, Inc. v. Gracey*, 600 F.Supp. 1396, 1404 (D.D.C.1985), *aff'd on other grounds*, 809 F.2d 794 (D.C.Cir.1987). The language of § 1253(h) was changed to conform with Article 33 of the Protocol. The plaintiffs in this case cannot avail themselves of any judicially enforceable rights under section 1253(h).

Finally, the INA's asylum provision which was added by the Refugee Act of 1980 is also limited by its terms to aliens in the United States or at its borders or a port of entry. Section 1158(a) states as follows:

> The Attorney General shall establish a procedure for *an alien physically present in the United States or at a land border or port of entry*, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is

a refugee within the meaning of section 1101 (a)(42)(A) of this title.

8 U.S.C. § 1158(a) (emphasis added).

We agree with the district court that the clear meaning of this language is that the plaintiffs in this case—who have been interdicted on the high seas—cannot assert a claim based on the INA or the Refugee Act.

Plaintiffs argue that the language of § 1158(a) should be read to include a land border or port of entry *or* its functional equivalent. Plaintiffs contend that because the United States Government is reaching out into the Caribbean to interdict them, it is effectively extending the borders to that extent. We decline to interpret the statute this broadly. The plain language of the statute is unambiguous and limits the application of the provision to aliens within the United States or at United States' borders or ports of entry. *See Haitian Refugee Center v. Gracey*, 600 F.Supp. 1396, 1404 (D.D.C.1985), *aff'd on other grounds*, 809 F.2d 794 (D.C.Cir.1987). The plaintiffs in this case have been interdicted on the high seas and have not yet reached "a land border" or a "port of entry." Therefore, their claims under the INA must fail.

B. *Plaintiffs' Claims under the Executive Order*

Congress has committed to the President broad authority to control the entry of aliens or of any class of aliens when he determines that it would be detrimental to the interests of the United States. 8 U.S.C. § 1182(f). The President may suspend or restrict the entry of aliens for the period he deems necessary and impose the restrictions he deems ap-

propriate. *Id.* Pursuant to this broad grant of authority, President Reagan issued Executive Order 12324.

The plaintiffs assert that the Executive Order provides a basis for a private cause of action that may be enforced by the district court pursuant to its federal question jurisdiction. Plaintiffs contend that the Executive Order embodies, and on its own terms sets forth, the law against forced return of political refugees. Specifically, the plaintiffs rely on the language in the Executive Order that says "no person who is a refugee will be returned without his consent."

Assuming that the district court has jurisdiction to review a claim based on the Executive Order, plaintiffs still must state a cause of action on which relief can be granted. *See Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir.), *cert. denied* 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967). We hold that the Executive Order does not give rise to a private cause of action.

The Executive Order was issued specifically to establish a procedure for interdiction of Haitian migrants on the high seas. The program was intended as an emergency measure to deal with a situation that the President determined to be detrimental to the interests of the United States. By its terms, the Executive Order envisioned a procedure taking place entirely on the high seas. It contemplated a procedure that could quickly screen those on board interdicted boats and determine who had potential claims of persecution that would prevent repatriation. Because of the nature of the screening process and the fact that it was to take place on the high seas, it could not have been the intention of the President to allow the interdictees to initiate judicial review of

their cases in the district courts of the United States. A private civil action was not contemplated under Executive Order 12324 and the plaintiffs' claim based on this order does not state a claim upon which relief can be granted.

C. *Plaintiffs' Claim under the INS Guidelines*

Plaintiffs also contend that they have substantive rights under the INS Guidelines which are being violated by the defendants' actions in this case. We disagree. The INS Guidelines, as discussed above, create no substantive rights that can be judicially enforced. The guidelines are more akin to internal operating instructions as opposed to regulations. As such, they do not have the force and effect of law. *Pasquini v. Morris*, 700 F.2d 658 (11th Cir.1983); *Dong Sik Kwon v. INS*, 646 F.2d 909 (5th Cir.1981).

In *Pasquini*, this court analyzed an internal operating instruction of the INS, O.I. 103.1(a)(1)(ii), and determined that the INS's internal operating instructions came within the exception to the APA's procedure for publication in the Federal Register of all proposed rulemaking by administrative agencies.

Section 553(b) of the APA provides, with certain exceptions not applicable here, that the publication procedures do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice . . ." 5 U.S.C. § 553(b). The court concluded that internal operating instructions fell within this category "since the INS considers such instructions to be internal directives, not having the force and effect of law as do regulations." *Pasquini*, 700 F.2d at 662 (citing *Dong Sik Kwon*, 646 F.2d at 918) (internal quotes omitted). Finally, the court held that "[t]he internal operating procedures of the INS are for the administrative convenience of the INS only." *Id.*

We hold that the INS Guidelines in this case are internal guidelines for employees of the INS. These Guidelines were sent in the form of a memorandum to INS employees assigned to duties relating to the interdiction program. They were not intended to grant substantive rights but were only intended to give guidance to those INS employees involved in the interdiction program. The district court correctly denied injunctive relief based on this claim.

The plaintiffs also claim that customary international law, or international common law, creates enforceable rights. This claim is meritless and does not warrant discussion.

VI. HRC's FIRST AMENDMENT RIGHT OF ACCESS

One of the grounds relied upon by the district court in issuing the December 3, 1991 preliminary injunction against repatriation of the interdicted Haitians was HRC's claimed First Amendment right of access to those Haitians.[6] This court vacated that preliminary injunction on December 17, 1991. At that time we did not address HRC's First Amendment claim on the merits. Rather, this court held that HRC's purported First Amendment right of access to the Haitians could not support the preliminary injunction because the injunction merely barred repatriation and did not grant the access sought.

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[6] We agree with the district court's conclusion that the Haitian refugees do not have correlative First Amendment rights of their own. *See* Dec. 3, 1991 Memorandum Order at 44.

> The injunctive relief granted by the district court does not require the defendants to allow HRC access to the Haitian interdictees, it enjoins the defendants from repatriating them. Because the relief granted does not address the right of access asserted by HRC, the First Amendment claim cannot support the injunction.

Haitian Refugee Center v. Baker, 949 F.2d 1109, 1111 (11th Cir.1991).

On remand, the district court reiterated its conclusion that HRC has a First Amendment right of access to the interdicted Haitians. The court found that, with respect to Guantanamo Bay Naval Station, HRC sought access to portions of the installation which were being used for the non-military purpose of detaining refugees. Dec. 20, 1991 Order at 9. The district court also found that HRC lacked alternative means of exercising its First Amendment right other than direct access to the interdicted Haitians in United States custody. *Id.* The court then issued the following injunctive relief:

> [F]or the reasons described in section III, plaintiffs' request for an injunction ordering defendants to grant plaintiffs' access to the interdicted class members is *GRANTED* as follows: defendants shall grant plaintiffs' counsel meaningful access to its interdicted class members, before repatriation, subject to reasonable, content-neutral, time, place and manner restriction. . . .

Id. at 11.

On appeal, the United States argues that HRC has no First Amendment right whatsoever to communicate with aliens being held outside the United States. The government also maintains that the district

court's preliminary injunction is overly broad and imposes affirmative obligations on the United States. HRC, on the other hand, claims that "[t]he denial of access to the emigrees [sic] on Coast Guard cutters and at Guantanamo Bay Naval Station violates the rights of the HRC, whose organizational purpose has been thwarted in that it has been unable effectively to provide assistance to the refugees including legal assistance and information concerning their legal rights."[7] HRC also argues that the issue of whether the preliminary injunction requires access to Coast Guard ships is not ripe for review since the district court has not resolved this question. Because we can find no support for its claim in the laws or Constitution of the United States, we hold that HRC has failed to state a claim upon which relief can be granted.

The cases that the district court relies upon to justify its conclusion that HRC is likely to prevail in its First Amendment claim—*NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978)—do not recognize a right of access to persons properly in government custody. In *Button*, the National Association for the Advancement of Colored People (NAACP) challenged a Virginia statute that proscribed "the improper solicitation of any legal or professional business." 371 U.S. at 419, 83 S.Ct. at 331. The Supreme Court of Virginia had interpreted this statute as prohibiting "any

[7] The district court noted that there was no allegation that the government's denial of access to the interdicted Haitians was the product of viewpoint discrimination. See Dec. 3, 1991 Memorandum Order (incorporated into Dec. 20, 1991 Order at 8).

arrangement by which prospective litigants are advised to seek the assistance of particular attorneys." *Id.* at 433, 83 S.Ct. at 338. This ban encompassed the NAACP's efforts to encourage others to bring suits, with the assistance of the NAACP's legal staff, challenging segregation in Virginia's public schools. *Id.* at 426, 83 S.Ct. at 334. The United States Supreme Court held "that the activities of the NAACP [soliciting prospective litigants] . . . are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not *prohibit*, under its power to regulate the legal profession. . . ." *Id.* at 428-29, 83 S.Ct. at 335 (emphasis added). Thus, the Court held that the statute, as applied to the NAACP, unconstitutionally infringed the organization's rights of free speech and association. *Id.*

Similarly, in *In re Primus*, the Supreme Court held that the South Carolina Supreme Court had unconstitutionally infringed the associational rights of an American Civil Liberties Union (ACLU) staff attorney by publicly reprimanding her after she solicited a potential litigant by mail on behalf of the ACLU. 436 U.S. at 439, 98 S.Ct. at 1908. The potential litigant had been sterilized as a condition of receiving public medical assistance. *Id.* at 415, 98 S.Ct. at 1896. The Court noted that "[t]he First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,'" *Id.* at 432, 98 S.Ct. at 1904-05 (quoting *Button*, 371 U.S. at 437, 83 S.Ct. at 340). Finding that "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public," *id.* 436 U.S. at 431, 98

S.Ct. at 1904, the Court concluded that South Carolina's disciplinary rules could not constitutionally be applied to the ACLU attorney's solicitation of a potential litigant by letter since that solicitation was "intended to advance beliefs and ideas." *Id.* at 438 n. 32 & 439, 98 S.Ct. at 1908 & n. 32.

Button and *In re Primus* recognize a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression. This right is predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant. *See Button*, 371 U.S. at 440, 83 S.Ct. at 341 ("the exercise . . . of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be [prohibited]"). In the present case, the interdicted Haitians have no recognized substantive rights under the laws or Constitution of the United States.[8] Thus, it would be nonsensical to find that HRC possesses a right of access to the interdicted Haitians for the purpose of advising them of their legal rights.

Even assuming *arguendo* that HRC has some limited right to associate with interdicted Haitians who are detained outside of the United States and who themselves have no substantive rights enforceable in the United States, this right of association would not

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[8] The district court previously concluded that the interdicted Haitians have no rights under the United States Constitution. *See* Dec. 3, 1991 Memorandum Order at 44. Today, we express agreement with that conclusion. *See ante* at 1511 n. 6. Moreover, we decide today that the interdicted Haitians have none of the substantive rights—under Executive Order No. 12324, the 1967 United Nations Protocol Relating to the Status of Refugees, the Immigration and Naturalization Service Guidelines, the Refugee Act of 1980, the Immigration and Nationality Act, or international law—that they claim for themselves or that the HRC claims for them. *See ante* at 1514-15.

give rise to the right of access that HRC claims. In reality, HRC's claim is that it has a right to associate with the interdicted Haitians and it has a right to compel the Government to assist it in exercising that right. The Constitution, however, does not require the Government to assist the holder of a constitutional right in the exercise of that right. *Ukrainian-American Bar Ass'n. v. Baker*, 893 F.2d 1374, 1381 (D.C.Cir.1990); *see also DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989) ("the Due Process clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"); *Harris v. McRae*, 448 U.S. 297, 317-18, 100 S.Ct. 2671, 2688-89, 65 L.Ed.2d 784 (1980) ("[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . ., it does not confer an entitlement to such [government assistance] as may be necessary to realize all the advantages of that freedom"). Thus, associational freedom in no way implies a right to compel the Government to provide access to those with whom one wishes to associate. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 9 & 15, 98 S.Ct. 2588, 2594 & 2597, 57 L.Ed.2d 553 (1978) (acknowledging that the media has a right to communicate information once it is obtained yet holding that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control"). Certainly, neither *Button* nor *In re Primus* supports the conclusion that the Government infringes associational freedom when it denies access to those whom it lawfully detains.

The district court's preliminary injunction extends to grant HRC access to Haitians aboard Coast Guard ships at sea. As noted above, HRC suggests that we need not address this issue until the district court has resolved the entire First Amendment claim on its merits. The preliminary injunction, however, clearly raises this question. By its terms, the injunction extends to all "interdicted class members." These class members are being held both at Guantanamo Bay Naval Station and on Coast Guard cutters. The order is in no way limited to those Haitians at Guantanamo. It is equally applicable to those interdictees currently on Coast Guard ships, as well as those who may be on board Coast Guard ships in the future. Indeed, under the injunction the United States may not repatriate the Haitians aboard Coast Guard ships until HRC has been granted access to them. We also note this relief is consistent with that sought by HRC in its amended complaint, which specifically requests access to Haitians both at Guantanamo and on Coast Guard ships.

Providing access to these ships would impose a substantial burden on the United States. Such access would interfere with the ships' "intended purposes" of interdicting and screening the Haitian migrants and returning those deemed to be ineligible for refugee status. Coast Gaurd officials would be forced to either remove the ship from the theater of operation or suffer the presence of untrained civilians while conducting their mission. In order to provide access to the Haitians aboard the Coast Guard cutters, the United States must put the Haitians ashore at Guantanamo, in the United States, or elsewhere or, alternatively, transport HRC representatives to the ships

themselves. Either way, the United States is forced to assist HRC and subsidize the pursuit of its objectives.

Similarly, with reference to the Haitians being held at Guantanamo Bay Naval Station, the United States must hold the interdicted Haitians in custody—at tremendous expense to the American taxpayer—to assist HRC in its right to "meaningful access." Presumably, the government is also obligated to provide HRC representatives with transportation to and from Guantanamo, as well as shelter and other necessities while they are there.

Directly on point is *Ukrainian-American Bar Ass'n*. In that case, the Ukrainian-American Bar Association (UABA) brought suit to establish its "rights of access to [Soviet aliens seeking asylum in the United States] under the First Amendment to counsel such individuals regarding their Constitutional and statutory right to apply for political asylum." 893 F.2d at 1377. The United States Court of Appeals for the D.C. Circuit framed the issue presented as "whether the Government, once having acted to place [an] alien in custody, violates the first amendment rights of third parties when it declines to make provision for them to contact him." *Id.* at 1381. The court acknowledged that *Button* and *In re Primus* recognize a First Amendment right to solicit clients to engage in litigation as a form of political expression. *Id.* The court concluded, however, that the Government does not infringe that right when it refuses to provide access to an alien in its custody who is seeking political asylum:

> [W]hen an unadmitted alien is taken into custody for interrogation and "immediate action,"

> his entrance into custody does not infringe the right of any third party—whether a lawyer or another with an interest in getting a message through to the alien—to engage in constitutionally protected political expression. . . .
>
> Furthermore, the Government does not infringe a third party's first amendment right to associate with an alien by holding the alien for a period of time during which the third party is unable to contact him. The loss of the right of association while the alien is held incommunicado by the Government is not of constitutional significance; it is but an indirect consequence of the Government's pursuit of an important task, *viz.* resolving "immediate action" cases.

Id.

HRC does not assert that the Government seeks to repatriate the interdicted Haitians *in order to* interfere with HRC's associational freedom. Indeed, in light of the record before us, it would be absurd for HRC to make such an allegation. HRC's claim is, therefore, nothing more than a claim that it has a right to compel the Government to assist it in exercising a right of association. *Any* court order enforcing this so-called "right" would impose an inappropriate affirmative obligation on the Government. This is more than the Constitution requires. We hold, therefore, that HRC's claim to a right of access to the interdicted Haitians is not a claim upon which relief can be granted and instruct the district court on remand to dismiss it.

VII. CONCLUSION

Case No. 91-6099

The "temporary restraining order" issued on December 18, 1991, has expired by its terms. The appeal of that order, our Case No. 91-6099, is DISMISSED as MOOT.

Case No. 91-6105 and 91-6118

All injunctive orders issued by the district court in its Case No. 91-2653-CIV are VACATED. The case is REMANDED to the district court. The district court is instructed upon remand to dismiss the action because the complaint fails to state a claim upon which relief can be granted.

The mandate shall issue immediately.

INJUNCTION ORDERS VACATED; REMANDED WITH INSTRUCTIONS.

HATCHETT, Circuit Judge, dissenting:

I respectfully dissent. We should examine what is really involved in this case. Reading the majority opinion, one might suppose that many precedents and principles of law prevent the Haitian Refugee Center (HRC) from having meaningful access to the refugees at Guantanamo Bay and on Coast Guard vessels. In reality, that is not the case. The principal matters before this court are: (1) whether the refugees have rights under the Administrative Procedures Act (APA), and (2) whether HRC has a First Amendment right to meaningful access to the refugees.[1] The

[1] Other issues were brought to the court through HRC cross-appeal, but will not be addressed in this dissent due to the expedited nature of this case.

district court correctly ruled that (1) the refugees have the right under the APA to be properly interviewed, and (2) HRC has a First Amendment right of access in accordance with reasonable time, place, and manner limitations. Consequently, the district court ordered the government not to repatriate the refugees before HRC's representatives were given the opportunity to counsel them regarding their rights and status in the present situation. Although the district court allowed the government to impose strict limitations, the government has steadfastly refused to allow HRC meaningful access to the refugees, under any circumstances.

The majority cites many cases for many legal propositions, but when all is said and done, the majority simply accepts the government's contention that these refugees have no enforceable rights in an American court because they have not reached the continental United States. For the majority, that is the heart of the matter; the refugees are outside of the United States. The government makes the "outside the United States" argument, and the majority accepts it, although everyone in this case agrees that agencies of the United States captured the refugees and are holding them on United States vessels and leased territory. Moreover, the majority accepts this argument although everyone in the case agrees that the refugees are being prevented from reaching the shores of the continental United States.[2] The majority accepts a

[2] As stated in a previous dissent, the capture of Haitian refugees in international waters is authorized under a 1981 agreement between the Reagan administration and the totalitarian government of Jean-Claude "Baby Doc" Duvalier. The record does not disclose such an agreement with any other country.

pure legal fiction when it holds that these refugees are in a different class from every other "excludable alien" because Haitians, unlike other aliens from anywhere in the world, are prevented from freely reaching the continental United States.[3]

In addition to accepting this pure legal fiction, the majority fails to follow at least two well established principles of American law. First, from the beginning, the majority has proceeded as though called upon to decide the issues on the merits, rather than to review the appropriateness of the district court's entry of preliminary injunctions. Under our circuit's law, the majority should have reviewed the appropriateness of the district court's preliminary injunctions by considering whether HRC and the refugees have proved: (1) a substantial likelihood of prevailing on the merits of their claims; (2) a substantial threat of suffering irreparable injury in the absence of an injunction; (3) that the threatened injury to them outweighs the potential harm an injunction would cause the government; and (4) that the injunction would not be adverse to the public interest. *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555 (11th Cir. 1989).

Secondly, the majority determines the issues on appeal as though they are purely matters of law, without considering the district court's findings of fact. For example, early in this case, the majority held that the district court's First Amendment *remedy* was too broad because the Guantanamo Naval Base is a military installation and military activities would be dis-

[3] This court noted in *Jean v. Nelson*, 727 F.2d 957, 961 n. 1 (11th Cir.1984) (en banc): "[A]liens who have reached our border but have not formally been admitted to the United States are described as 'excludable' . . . aliens."

rupted if a few lawyers visited the refugee compound.[4] To the contrary, the district court found that the refugees are being held in a portion of the base not used for military purposes. The record in this case shows that television reporters, church officials, political activists, congressmen, and a host of other people regularly visit the Haitian compound at Guantanamo, evidently without disrupting military operations.

Among the other district court findings the majority ignores, are the following: The refugees fled Haiti because of the overthrow of the legal government; *many face irreparable and even fatal injury*, if returned; the government's harms, if any, are monetary and speculative; low level officials are not screening according to the INS guidelines; screening procedures are inadequate; conditions in Haiti have worsened in the last month [November-December, 1991]; *refugees who have been returned have faced persecution*; the Haitian Red-Cross is under the control of the military; and the government continues to deny HRC's representatives access to the refugees. Had the majority seriously considered these factual findings and reviewed the preliminary injunctions under the proper standards, it would have concluded, as I do, that the preliminary injunctions were properly issued.

I. THE FIRST AMENDMENT CLAIM

In an earlier opinion, the majority stated that the injunction granted by the district court was too broad to serve the First Amendment right of access as-

[4] Surprisingly, at this stage of the case, the majority holds that HRC has no First Amendment rights.

serted by HRC. *HRC v. Baker*, 949 F.2d 1109, 1111 (11th Cir.1991). In its opinion today, the majority holds that HRC has no such right. While I concur in the majority's conclusion that HRC's right of access to the interdicted Haitians cannot compel the government to allow it aboard United States Coast Guard cutters on the high seas, I dissent from the remainder of the majority's opinion on the First Amendment issue.

As a reviewing court, we must clearly state the law. In *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), a case the majority completely ignores, we did so. "The Supreme Court has repeatedly emphasized that counsel have a first amendment right to inform individuals of their rights, at least when they do so as an exercise of political speech without expectation of remuneration. . . ." 727 F.2d at 983. HRC asserts precisely such a right in this case. Yet, despite *Jean*, the majority concludes that HRC has no First Amendment right of access to the refugees, because the refugees themselves have no rights. One conclusion simply does not follow from the other. Nothing in *Jean* predicates HRC's First Amendment right of access to the Haitians on the existence of rights in the Haitians themselves. The majority reinterprets *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) to find such a predicate which the holdings of those cases do not require.

The district court found that Guantanamo Bay Naval Base is replete with civilians and civilian functions. The base as a whole, however, is surely a non-public forum. *See Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976). The Supreme

Court stated the law governing First Amendment rights in non-public forums in *Perry Education Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983):

> In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech *is reasonable and not an effort to suppress expression merely because public officials oppose the speakers view.*

460 U.S. at 46, 103 S.Ct. at 955 (emphasis added). Later in the opinion, the Court stated:

> Implicit in the concept of the non-public forum is the right to make distinctions in access on the basis of subject matter and speaker identity. . . . The touchstone for evaluating these distinctions is *whether they are reasonable in light of the purpose which the forum at issue serves.*

460 U.S. at 49, 103 S.Ct. at 957 (emphasis added). Thus, even in a non-public forum, restrictions on speech must be reasonable and not motivated solely by the government's opposition to the speaker's point of view. While the government may decide that its interests in reserving the non-public forum for its intended purposes require the complete exclusion of certain speakers, such as exclusion must be "reasonable in light of the purpose which the forum at issue serves." *Perry*, 460 U.S. at 46, 49, 103 S.Ct. at 955, 957.

The record reveals that the government has indeed discriminated against HRC based upon the content of its speech. The district court found that the government has "opened the camps to members of the

press and to representatives of the United Nations High Commission on Refugees." It has allowed access to the refugees to many individuals and groups. But, it has denied such access to the HRC lawyers who seek to assist the Haitians in understanding and navigating through the predicament in which our government placed them.

Applying the *Perry* standard to these facts, the district court did not err in holding that the government must allow HRC access to the Haitians at Guantanamo Bay, subject to appropriate time, place, and banner restrictions. First Amendment rights vary according to the specific characteristics of the forum. *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 650-51, 101 S.Ct. 2559, 2565-66, 69 L.Ed.2d 298 (1981). Accordingly, such rights are broader in those parts of a military base used for nonmilitary functions than in areas utilized for purely military functions. *See Flower v. United States*, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972). The majority completely ignores the significance of the district court's finding that "the portions of the military installation to which HRC seeks access are not used for military purposes." The special master found that Guantanamo hums with civilian activity and is a "slice of America." Thus, the district court did not abuse its discretion in finding that the government's decision to exclude HRC from Guantanamo Bay was unreasonable in light of the "purpose which the forum at issue serves." *Perry*, 460 U.S. at 49, 103 S.Ct. at 957.

As the Supreme Court held in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972), an American citizen's First Amendment rights may not constrain the government's power to

exclude aliens from the United States. 408 U.S. at 768, 92 S.Ct. at 2584. In this case, however, HRC only asked for access to the Haitians, not their admission to the United States. I would uphold the district court's grant of a preliminary injunction temporarily staying repatriation of the Haitians under the general principle that federal courts may issue injunctions to preserve the status quo during litigation. *See, e.g., Hollon v. Mathis Independent School Dist.*, 491 F.2d 92, 93 (5th Cir.1974) (per curiam). While an appeal was pending in this case, the district court properly issued a limited preliminary injunction to ensure that HRC's First Amendment right was not circumvented by repatriation of the refugees pending expedited determination on the merits.

The majority is correct in holding that the government is not required to subsidize HRC's access to the Haitians. In order to allow HRC the access to which it is entitled under the First Amendment, however, the government may have to provide some assistance in this case that it would not be obligated to provide under more "normal" circumstances.[5] The district

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[5] None of the cases cited by the majority compel a different result. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989) and *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) were both cases brought under the Due Process Clause and thus are not dispositive of the First Amendment claim asserted here. *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) is a case dealing with media access to government information and thus is also inapposite to the right asserted here. Finally, *Ukrainian American Bar Ass'n v. Baker*, 893 F.2d 1374, 1381 (D.C.Cir.1990) is inapplicable for two reasons. First, the plaintiffs in that case sought to require the government to provide information to excludable aliens. In this case, HRC

court must determine these factual matters. The majority's presumption that the government is "obligated" under the district court order "to provide HRC representatives with transportation to and from Guantanamo as well as shelter and other necessities while they are there," is completely unsupported by the record before this court. This appellate court may not make findings of fact, especially on matters not borne out by the record.

Finally, the majority opinion flouts a recognized canon of the legal profession. Lawyers must have access to their clients so they may advise them of potential rights and causes of action in American courts. Even if the clients have no such rights or causes of action, the lawyer is entitled to counsel the client regarding the legal situation and the available options. Instead, in this case, the majority holds that the Haitian refugees have no rights enforceable in American courts, and therefore they have no business meeting with lawyers. Thus, the majority deprives these non-English speaking Haitians, unschooled in the American legal system, of lawyers in a situation affecting their most fundamental interests, because of a prior determination that they have no rights to justify meeting with American lawyers. Obviously, such a determination of the Haitians' rights should be made only after they have received the benefit of counsel.

I would remand the case to the district court for it to make findings of fact regarding the scope of HRC's First Amendment right of access to the

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seeks only a removal of the government's bar on HRC's ability to communicate with the Haitians. Second, *Ukrainian American Bar Ass'n* is not the law of this circuit, unlike *Jean v. Nelson*, a case which the majority has completely ignored.

Haitians at Guantanamo Bay, to determine the appropriateness of time, place, and manner restrictions on that right, and to tailor the existing injunction to conform to its findings.

II. JUDICIAL REVIEW UNDER THE APA

A. BACKGROUND

After previously determining that the HRC would not prevail on the merits of an APA claim, the district court reconsidered the APA claim in light of this court's December 17, 1991 opinion and the briefs filed before this court. The district court, having the benefit of this court's opinion and a thorough briefing of the issue, recognized the significant distinction between "the President's discretion in establishing the program and subordinates' discretion or lack thereof in following program procedures and guidelines." The district court concluded that a court reviewing the actions of subordinates in carrying out the program would have meaningful standards against which to measure those actions. On appeal, the Eleventh Circuit majority reversed the district court on the basis of the district court's *previous* understanding of the APA issue which viewed the suit as challenging the broad grant of discretion to the President in establishing the interdiction program.

B. DISCUSSION

The majority holds that the APA provides no basis for HRC's claims, because the presumption of reviewability normally afforded agency action withers in the light of national security or foreign affairs concerns. Additionally, the majority holds that neither the

Executive Order nor the various international laws and statutory provisions upon which HRC relies provide any guidance regarding the procedures used in repatriation decisions. Because the APA provides for judicial scrutiny of the actions of low ranking government officials in order to determine if the officials are in compliance with Article 33 and the INS guidelines issued pursuant to Executive Order 12324, I would uphold the preliminary injunction on the APA claim.

Generally, the APA provides a cause of action to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Both Article 33 and Executive Order No. 12324 with its implementing INS guidelines charge executive officials with the enforcement of United States immigration law. The law prohibits the return of political refugees to a country where they face persecution because of their political views. The actions of lower level executive officials in the field are subject to judicial review under the APA in order to determine if the officials are complying with the law's mandate, unless the law itself precludes judicial review, or the actions of the executive officials have been committed to their discretion by law. *Compare* 5 U.S.C. § 706(2)(A) (providing the scope of judicial review) *with* 5 U.S.C. § 701(a) (providing exceptions to judicial review). HRC and the class of Haitians interdicted on the high seas can avail themselves of this judicial review if: (1) they satisfy the standard set out in 5 U.S.C. § 702, (2) the officials' actions are reviewable under 5 U.S.C. § 704 and (3) the officials' actions do not come under the exclusion provisions of 5 U.S.C. § 701(a)(1) and (2).

1. Refugees Satisfy Sections 702 and 704

First, a reviewing court must determine whether HRC and the class satisfy the standard of 5 U.S.C. § 702. Section 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The majority implies that the APA does not apply to aliens outside the borders of the United States because such aliens are not "persons" for purposes of APA review. Nowhere in the language of the statute does it state that a "person" must be a United States citizen. In fact, the statutory definition of "person," defined at 5 U.S.C. § 551(2), broadly defines the word as an "individual, partnership, corporation, association, or public or private organization other than an agency." Since the language of the APA does not specify that persons bringing suit under the Act must be United States citizens, HRC should not be precluded from raising an APA claim on that basis. *See also Stone v. Export-Import Bank*, 552 F.2d 132, 136 (5th Cir. 1977), *cert. denied*, 434 U.S. 1012, 98 S.Ct. 726, 54 L.Ed.2d 756 (1978) (holding that foreign agency was a person); *Constructores Civiles De Centro America, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C.Cir.1972) (holding that APA review concerning a project in Nicaragua was available to a Honduran corporation); *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961) (noting that the APA "does not say 'any citizen.' It does not say 'any person physically present in the United States.' . . . [T]he emphasis is on the breadth of the coverage."). *O'Rourke v. United States Dept. of Justice*, 684 F.Supp. 716, 718 (D.D.C.1988) (hold-

ing that an Irish citizen imprisoned in his own country fell within the definition of "person" used in the APA); and *Neal-Cooper Grain Co. v. Kissinger*, 385 F.Supp. 769, 776 (D.D.C. 1974) (holding that "person" included Mexican government).

Next, a reviewing court must determine whether HRC is "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. The actions of low ranking government officials charged with the duty of properly interviewing the refugees constitute agency action. *See* 5 U.S.C. § 701(b)(1); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971). The district court found that the refugees interdicted on the high seas have "well founded fears of political persecution if returned to Haiti." Specifically, the district court found that the refugees will suffer irreparable injury in the absence of an injunction because the procedures the agency followed in screening them were inadequate to properly identify political refugees. Under the Executive Order with its implementing guidelines, Haitians interdicted on the high seas are to be returned to Haiti, unless they are political refugees. Therefore, HRC and the interdicted Haitian class have been adversely affected by the agency's action of failing to follow agency rules setting forth adequate procedures to identify and protect Haitians who are political refugees.

Low ranking government officials have failed to take the steps necessary to ensure the enforcement of the United States immigration laws as found in the Protocol and the Executive Order with its implementing INS guidelines. Thus, the Haitians interdicted on the high seas are "suffering legal wrong because of

agency action." *See* 5 U.S.C. § 702. Both the Protocol and the Executive Order with its implementing INS guidelines constitute the relevant United States law relating to the interdiction of Haitians on the high seas. 'As I have previously concluded, the subject matter, legislative history, and subsequent construction of the Protocol support the proposition that it is self-executing and binding upon the United States in accordance with Article VI of the United States Constitution. *See Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109, 1113-14 (11th Cir. 1991) (Hatchett, J., dissenting'). Additionally, the Protocol's protections apply to refugees outside the continental United States. Thus, Haitians interdicted on the high seas outside the continental United States are entitled to the Protocol's protections. *See Haitian Refugee Center, Inc. v. Baker*, 949 F.2d at 1115-16.

The Executive Order, which is based upon the authority vested in the President by the Constitution and statutes of the United States, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. §§ 1182(f) and 1185(a)(1), is accorded the force and effect of a statute enacted by Congress. *See Farkas v. Texas Instruments*, 375 F.2d 629, 632 (5th Cir.), *cert. denied*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967); *see also Legal Aid Society of Alameda City v. Brennan*, 608 F.2d 1319, 1329-30 n. 14 (9th Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980). Since the low ranking government officials' actions violate these laws, the Haitians interdicted on the high seas are aggrieved by agency action within the meaning of relevant law. *See* 5 U.S.C. § 702. Thus, HRC and the refugees satisfy the requirements of 5 U.S.C. § 702.

Nevertheless, in order to be reviewable, the decision to repatriate must constitute "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The refugees were forcefully repatriated despite inadequate screening procedures used by low ranking government officials. Therefore, INS took final action, and the Haitians had no other adequate remedy to compel INS officials to comply with the mandates of United States law. Thus, this agency action is subject to judicial review unless the relevant law precludes judicial review, or the action of the agency is committed to its discretion by law. *See* 5 U.S.C. § 701(a)(1) and (2).

2. Reviewability and Section 701(a)(1) Exceptions

Once the refugees established that they met the criteria set out in APA sections 702 and 704, a strong presumption of reviewability of agency action attached. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 2135, 90 L.Ed.2d 623 (1986). In *Bowen*, the Court noted:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

Bowen, 476 U.S. at 671, 106 S.Ct. at 2136 (citing S.Rep. No. 762, 79th Cong., 1st Sess. 26, (1945)). In the present case, the government is in effect asking

for a "blank check" drawn to the credit of the INS because the Haitian refugees have not reached the shores of the United States.

The actions of low ranking government officials charged with the duty of properly interviewing the refugees are subject to judicial review unless it is clear that such review is barred. *See Morris v. Gressette*, 432 U.S. 491, 500-01, 97 S.Ct. 2411, 2418, 53 L.Ed.2d 506 (1977); *Barlow v. Collins*, 397 U.S. 159, 165, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). Nothing in the Protocol or Executive Order 12324 with its implementing INS guidelines precludes judicial review. As noted earlier, I concluded in *Haitian Refugee Center v. Baker*, 949 F.2d at 1113-16 that the Protocol incorporating Article 33 is self-executing and applies extraterritorially. Article 33 provides:

> No contracting state shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Convention Relating to the Status of Refugees, art. 33, ¶ 1, 198 U.N.T.S. 150, 176 (July 28, 1951). The Protocol defines "refugee" as any person who,

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Protocol, art. 1, ¶ 2, 19 U.S.T. 6223, 6225; T.I.A.S. No. 6577 at 3. Nothing in the language of Article 33 or definitional sections of the Protocol precludes judicial review of the enforcement of the law's mandate.

Additionally, a district court does have jurisdiction to evaluate claims based on an executive order. *See Farkas*, 375 F.2d at 632. The Executive Order on which the refugees rely states:

> [N]o person who is a refugee will be returned without his consent. . . . The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

Exec.Order No. 12324, 46 Fed.Reg. 48,109 (1981). Nevertheless, the majority rejects the refugees' claim based on the Executive Order, stating that the Executive Order does not give rise to a private cause of action. Apparently, the majority believes that since the Executive Order establishes an interdiction program that takes place on the high seas, "it could not have been the intention of the President to allow the interdictees to initiate judicial review of *their cases* in the district courts of the United States." Majority Op. at 1511 (emphasis added). At this point the majority's position must fail.

The refugees do not seek judicial review of the denial of asylum in their individual cases. The majority took note of this fact when it recognized

"[HRC's] claim . . . is not based on a challenge to any individual determination made by the INS officers. Rather, the plaintiffs challenge the procedure used to interview the interdictees in order to determine which ones are subject to being repatriated." Majority Op. at 1508. The refugees' assertion that low level executive officials are not following guidelines for the interviewing procedures enables them to pursue this cause of action.

This case is analogous to *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), *aff'd* 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). In *Jean*, we held that although courts have no authority to evaluate individual deportation orders, courts do have the authority to determine whether the actions of lower-level immigration officials were exercised in accordance with executive policy. We stated:

> [S]ince the discretion of lower-level immigration officials is circumscribed not only by legislative enactments but also by the instructions of their superiors in the executive branch, . . . [t]he district court must still determine whether the actions of lower-level officials in the field conform to the policy statements of their superiors in Washington.

Jean, 727 F.2d at 978. In this case, the refugees do not seek review of individual asylum determinations, but rather seek review of the procedures the lower-level officials employed. The refugees claim that these lower-level officials did not follow the guidelines promulgated pursuant to the Executive Order in processing them. They also allege that the officials acted arbitrarily and capriciously. Although the aliens in *Jean* were on United States soil and the Haitians in

this case were not, nothing in the language of the APA suggests that aliens cannot seek redress under the APA. Further, nothing in the language of the Protocol or the Executive Order precludes the refugees from asserting a cause of action based on the APA to set aside the acts of low ranking government officials.

The Supreme Court, however, has held that section 701(a)(1) of the APA can still apply to preclude judicial review even if the specific language of the law does not preclude such review. In *Bowen*, the Supreme Court stated that the presumption against reviewability can be overcome by "specific language or specific legislative history that is a reliable indicator of congressional intent, or a specific congressional intent to preclude judicial review that is 'fairly discernible' in the detail of the legislative scheme." *Bowen*, 476 U.S. at 673, 106 S.Ct. at 2137 (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 104 S.Ct. 2450, 2456, 81 L.Ed.2d 270 (1984)). The *Bowen* Court also recognized that

> the congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it . . . or from the collective import of legislative and judicial history behind a particular statute, . . . [or] by inferences of intent drawn from the statutory scheme as a whole.

Bowen, 476 U.S. at 673 n. 4, 106 S.Ct. at 2137 n. 4 (citations omitted). In this case, Presidential or Congressional intent to bar judicial review of the actions of low level government officials charged with the duty of properly interviewing refugees is not "fairly

discernable" in laws relating to the interdiction of Haitians. The legislative history surrounding the United States' accession to the Protocol does not indicate that Congress intended to bar judicial review of the enforcement of this law. Congress intended that the Protocol be self-executing and apply extraterritorially. *See Haitian Refugee Center v. Baker*, 949 F.2d 1109, 1113-14 (11th Cir.1991) (Hatchett, J., dissenting). *See also* Note, *Interdiction: The United States Continuing Violation of International Law*, 68 B.U.L.Rev. 773 (1988). Neither specific language nor reliable indicators rebut the presumption of reviewability. After examining as a whole the scheme of the United States's laws relating to the interdiction of Haitians on the high seas, I conclude that United States immigration law concerning interdiction does not preclude judicial review in this setting. Thus, section 701(a)(1) of the APA is inapplicable.

Additionally, the President specifically provided in his Executive Order that the United States's immigration laws would be enforced outside the territorial boundaries and waters of the United States. This exportation of laws also constitutes an exportation of rights and duties. These rights and duties are detailed in the Protocol and the Executive Order. Since the government has a duty to enforce these rights outside the borders of the United States, the corresponding enforcement mechanisms must accompany these rights. Thus, I cannot conclude that the President did not intend for the remedy provided by the APA to accompany the exportation and enforcement of United States immigration laws. This court must not adopt the unconscionable position of divorcing the remedy of APA review from the right to such review created by the Protocol and the Executive Order.

3. Reviewability and the Section 701(a)(2) Exception

The majority states that the refugees have no right to judicial review of the government's compliance with the INA through the APA. Specifically, the majority points to the language of the INA to determine that the interdicted Haitians have no cognizable rights. However, it is on the refugees' right to judicial review, through the APA, testing the government's compliance with the Protocol and the Executive Order upon which I find that the refugees have demonstrated a likelihood of success. Thus, the court must determine whether meaningful guidelines exist that provide a method to evaluate the actions of the lower-level INS officials. *See Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985) (the APA is applicable in "[*sic*] instances where statutes are "drawn so that a court would have [a] meaningful standard against which to judge the agency's exercise of discretion"). In the language of the APA, the inquiry is whether the officials' actions were "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). I find that they are not.

The majority concedes that "['e]ven when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations.'" Majority Op. at 1508 (quoting *State of Florida, Dept. of Business Regulation v. United States Dept. of the Interior*, 768 F.2d 248, 1257 n. 11 (11th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986)). Further, in *CC Distributors, Inc. v. United States*, 883 F.2d 146, 154 (D.C.Cir.1989), the court held that administrative regulations promulgated to execute an agency's legal directives may serve as standards for

judicial review. *See also Center for Auto Safety v. Dole*, 846 F.2d 1532 (D.C.Cir.1988). The majority, however, finds that the language of the Protocol and the Executive Order neither limits lower-level INS agents' discretion nor enumerates specific criteria to be weighed when deciding who is a "refugee."[6]

What the majority fails to recognize is that the INS Guidelines serve as the standard for judicial review for both the Protocol and the Executive Order. The INS guidelines state that the "authority" upon which the guidelines are based includes "Article 33, United Nations Convention and Protocol Relating to the Status of Refugees" and "Executive Order No. 12324 dated September 29, 1981 (interdiction of Illegal Aliens)." The INS Guidelines for Interdiction at Sea were promulgated as a direct result of the Protocol and the Executive Order. The majority noted, "The Executive Order was issued specifically to establish a procedure for interdiction of Haitian migrants on the high seas." Majority Op. at 1510. The majority, however, found that the INS Guidelines did not provide meaningful standards for judicial review. Thus, the majority held that lower-level INS, officials' actions were committed to agency discretion by law. This conclusion is erroneous. In part, the INS guidelines state:

INS OFFICER RESPONSIBILITIES

A. To the extent that it is, within the opinion of the Commanding Officer of the United States

[6] In this instance, "refugee" is used as a legal term of art indicating interdictees who have undergone the appropriate screening procedures set forth in the INS guidelines. On other occasions, I have used the term "refugee" in its broad and non-legal sense.

Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person, based on their responses to the following inquiries:

1. Name;
2. Date of Birth;
3. Nationality;
4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);
5. All Documents or Evidence Presented;
6. Why did you leave Haiti;
7. Why do you wish to go to the United States;
8. Is there any reason why you cannot return to Haiti?

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicants concerning the claim).

The guidelines specifically detail information that INS officials are to obtain from each Haitian claiming refugee status. The guidelines do not use permissive language to describe how INS officials are to treat Haitians who make even bare claims that they qualify as refugees under the Protocol. Instead, the guidelines employ mandatory language such as "INS officers *shall* conduct individual interviews"; "Interviews . . . *will* be conducted out of the hearing of other persons"; "Individual records *shall* be made"; "If the interview suggests that a legitimate claim to refugee status exists, the person in-

volved *shall be removed* from the interdicted vessel, and his or her passage to the United States *shall* be arranged." INS Guidelines §§ C, D, E, G, and H. These guidelines state standards that are to be adhered to when processing interdicted Haitians. The government's failure to follow these guidelines, as found by the district court, means that the refugees have demonstrated a substantial likelihood of success on the APA claim.

C. CONCLUSION

HRC and the class of Haitians interdicted on the high seas can avail themselves of judicial review because: (1) they satisfy the standard set out in 5 U.S.C. § 702; (2) the government officials' actions are reviewable under 5 U.S.C. § 704; and (3) the government officials' actions do not come under the exclusion provisions of 5 U.S.C. § 701(a). Thus, the APA provides HRC with a cause of action to seek judicial review of the actions of low ranking government officials charged with the duty of properly screening Haitian interdictees.

APPENDIX I

TREATY, STATUTORY PROVISIONS, AND EXECUTIVE ORDERS INVOLVED

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1. Article 33 of the United Nations Convention Relating to the Status of Refugees provides:

> *Article 33.—Prohibition of expulsion or return ("refoulement")*
>
> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

2. The Administrative Procedure Act, 5 U.S.C. § 701(a), provides:

> **§ 701. Application; definitions**
>
> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

3. Section 243 of the Immigration and Nationality Act, as amended by Pub. L. No. 101-649, §§ 515 (a)(2), 606 (b)(3), 104 Stat. 5053, 5085, and codified at 8 U.S.C. 1253, provides:

> **§ 1253. Countries to which aliens shall be deported**
>
> **(a) Acceptance by designated country; deportation upon nonacceptance by country.** The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

> (1) to the country from which such alien last entered the United States;
>
> (2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
>
> (3) to the country in which he was born;
>
> (4) to the country in which the place of his birth is situated at the time he is ordered deported;
>
> (5) to any country in which he resided prior to entering the country from which he entered the United States;
>
> (6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
>
> (7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) Deportation during war. If the United States is at war and the deportation, in accordance with the provisions of subsection (a), of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

(c) Payment of deportation costs; within five years. If deportation proceedings are instituted at any time within five years after the entry of the alien for causes existing prior to or at the time of entry, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the ex-

pense of the owner or owners of the vessels, aircraft, or other transportation lines by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act: Provided, That the costs of the deportation of any such alien from such port shall not be assessed against the owner or owners of the vessels, aircraft, or other transportation lines in the case of any alien who arrived in possession of a valid unexpired immigrant visa and who was inspected and admitted to the United States for permanent residence. In the case of an alien crewman, if deportation proceedings are instituted at any time within five years after the granting of the last conditional permit to land temporarily under the provisions of section 252 [8 USCS § 1282], the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act and the deportation from such port shall be at the expense of the owner or owners of the vessels or aircraft by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act.

(d) Cost of deportation, subsequent to five years. If deportation proceedings are instituted later than five years after the entry of the alien, or in the case of an alien crewman later than five years after the granting of the last conditional permit to land temporarily, the cost thereof shall be payable from the appropriation for the enforcement of this Act.

(e) Refusal to transport or to pay. A failure or refusal on the part of the master, commanding officer, agent, owner, charterer, or consignee of a vessel, aircraft, or other transportation line to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this Act, or a failure or refusal by any such person to comply with an order of the Attorney General to pay deportation expenses in accordance with the requirements of this section, shall be punished by the imposition of a penalty in the sum and manner prescribed in section 237(b) [8 USCS § 1227(b)].

(f) Payment of expenses of physically incapable deportees. When in the opinion of the Attorney General the mental or physical condition of an alien being deported is such as to require personal care and attendance, the Attorney General shall, when necessary, employ a suitable person for that purpose who shall accompany such alien to his final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed, and any failure or refusal to defray such expenses shall be punished in the manner prescribed by subsection (e) of this section.

(g) Countries delaying acceptance of deportees. Upon the notification by the Attorney General that any country upon request denies or unduly delays acceptance of the return of any alien who is a national, citizen, subject, or resident thereof, the Secretary of State shall instruct consular officers performing their duties in the territory of such country to discontinue the issuance of immigrant visas to nationals, citizens, subjects, or residents of such country, until such time as the Attorney General shall inform the Secretary of State that such country has accepted such alien.

(h) Withholding of deportation or return. (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(d)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. (2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

4. EXECUTIVE ORDER No. 12807 provides:

INTERDICTION OF ILLEGAL ALIENS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185 (a)(1)), and whereas:

(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6233) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

(3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and

(4) There continues to be a serious problem of persons attempting to come to the United States

by sea without necessary documentation and otherwise illegally;

I, GEORGE BUSH, President of the United States of America, hereby order as follows:

Section 1. The secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented or numbered pursuant to the laws of the United States, or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5300; 13 U.S.T. 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the

Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).

(3) Vessels of foreign nations with whom we have arangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.

(3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

Sec. 3. This order is intended only to improve the internal management of the Executive Branch. Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right

or benefit, substantive or procedural (including without limitation any right or benefit under the Administrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

Sec. 4. Executive Order No. 12324 is hereby revoked and replaced by this order.

Sec. 5. This order shall be effective immediately.

/s/ George Bush

THE WHITE HOUSE.
May 23, 1992.

5. Executive Order 12324 of September 29, 1981, provides:

Interdiction of Illegal Aliens

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Sections 212(f) and 215 (a) (1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a) (1)), in view of the continuing problem of migrants coming to the United States, by sea, without necessary entry documents, and in order to carry out the suspension and interdiction of such entry which have concurrently been proclaimed, it is hereby ordered as follows:

Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended (46 U.S.C. 1451 *et seq.*), or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States of any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are

engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel.

(3) To return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist: provided, however, that no person who is a refugee will be returned without his consent.

(d) These actions, pursuant to this Section, are authorized to be undertaken only outside the territorial waters of the United States.

Sec. 3. The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

/s/ Ronald Reagan

THE WHITE HOUSE.
September 29, 1981.

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